CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1927

No. 134

S. J. SHAW, STATE AUDITOR, SUBSTITUTED FOR C. O. CHILDERS, STATE AUDITOR OF THE STATE OF OKLAHOMA,

vs.

GIBSON-SAHNISER OIL CORPORATION ET AL.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED MAY 3, 1927

(28,465)

(32,665)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 234

A. S. J. SHAW, STATE AUDITOR, SUBSTITUTED FOR C. C. CHILDERS, STATE AUDITOR OF THE STATE OF OKLAHOMA,

vs.

GIBSON-ZAHNISER OIL CORPORATION ET AL.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 18, 1927

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

DECEMBER TERM, A. D. 1926

No. 7567

A. S. J. SHAW, State Auditor, Substituted for C. C. Childers, State Auditor of the State of Oklahoma, Plaintiff in Error,

v.

GIBSON-ZAHNISER OIL CORPORATION et al., Defendants in Error

In Error to the District Court of the United States for the Western District of Oklahoma

STATEMENT OF FACTS

The United States Circuit Court of Appeals for the Eighth Circuit certifies that a record on a writ of error now pending discloses the following:

Miller Tiger, a full blood Creek Indian, received his allotment and thereafter a departmental oil and gas lease was executed, covering the same. The royalties therefrom were paid to the superintendent and special disbursing agent for the Five Civilized Tribes.

On July 26, 1915, Miller Tiger, who was a minor, through his guardians, Rosanna Brown and Barclay Morgan, requested the County Court of Okmulgee County, to invest the sum of $3,000.00 of these royalties in 160 acres of agricultural land in Okfuskee County, Oklahoma. Upon a hearing the court authorized the purchase of said land, and on October 24, 1915, the superintendent of the Five Civilized Tribes purchased said land out of the royalties in his hands by a check drawn upon the Miller Tiger fund payable to his said guardians and said check was by said guardians deposited in their general guardianship account in bank. On the same day the guardians drew their check against said account in favor of the vendor and delivered it to him in payment of the purchase price of the land. In the meantime, on July 26, 1915, the special form of deed

had been executed in accordance with the conditions exacted by the Department and by the court with the clause that said land should not be alienated or leased during the lifetime of the grantee prior to April 26, 1931, without the consent of and approval by the Secretary of the Interior.

On February 10, 1919, Miller Tiger executed a departmental oil and gas lease on the land so purchased to G. L. Sandlin, which lease was thereafter assigned to E. L. Robinson and Gibson-Zahniser Oil Corporation, defendants in error herein. Operating under said lease defendants in error have produced oil upon which the State Auditor of Oklahoma has levied and assessed gross production taxes in the total sum of $20,923.01, which said taxes were paid the State Auditor by defendants in error under protest, and this suit was instituted to recover the same.

Prior to the purchase of said land for Miller Tiger, the same was owned by C. L. Nelson, a non-Indian citizen, and such land was legally subject to State, county and municipal taxation while so owned. Since the purchase of said land for Miller Tiger, for the years 1916-1925, inclusive, ad valorem taxes on such land have been paid the county [fol. 2] treasurer of Okfuskee County by the United States Indian Agency at Muskogee, Oklahoma, and the said Miller Tiger still owns his original allotment in Okfuskee County, Oklahoma.

Judgment was for defendants in error in the trial court, and plaintiff in error has come to this Court by writ of error asking a reversal of said judgment.

The above taxes were levied and collected under authority of an existing statute of the State of Oklahoma (Compiled Oklahoma Statutes 1921, Sec. 9814) the pertinent portions of which are as follows:

"Every person, firm, association or corporation engaged in the mining or production within this State of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other crude oil or other mineral oil or of natural gas, shall within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D. 1916, and of each quarter-annual period thereafter expiring respectively, on the last day of June, September, December and March of each year, file with the State Auditor, a statement under oath, on forms prescribed by him showing the location of each mine or oil or gas well

operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable, and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per centum of the gross value of the production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this Act * * *.

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine, and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation, for any subsequent tax year shall be assessed and taxed as

other property within the taxing district in which such property is situated at the time. * * *

[fol. 3] "The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated * * *."

It is further certified that the following questions of law arise from the record and are presented, the decision of which is indispensable to a determination of the case. To the end that this court may properly discharge its duty, it desires the instruction of the Supreme Court upon them:

QUESTIONS CERTIFIED

Question 1. Had the Secretary of the Interior, on October 24, 1915, when this land was purchased, power to exempt from such state taxation land purchased under his supervision for a full blood Creek Indian with trust funds of that Indian, where the land so purchased was, at that time, subject to all State taxes?

Question 2. Is this tax a forbidden tax upon a federal instrumentality?

Kimbrough Stone, United States Circuit Judge.
Wm. T. Kenyon, United States Circuit Judge.
John C. Ballard, United States District Judge,
being the judges who sat in the Circuit Court of Appeals on the hearing of the case.

[fol. 4] Clerk's certificate to foregoing omitted in printing.

Endorsed on cover: File No. 32,665. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 234. A. S. J. Shaw, State Auditor, substituted for C. C. Childers, State Auditor of the State of Oklahoma, vs. Gibson-Zahniser Oil Corporation et al. (Certificate.) Filed May 3d, 1927. File No. 32,665.

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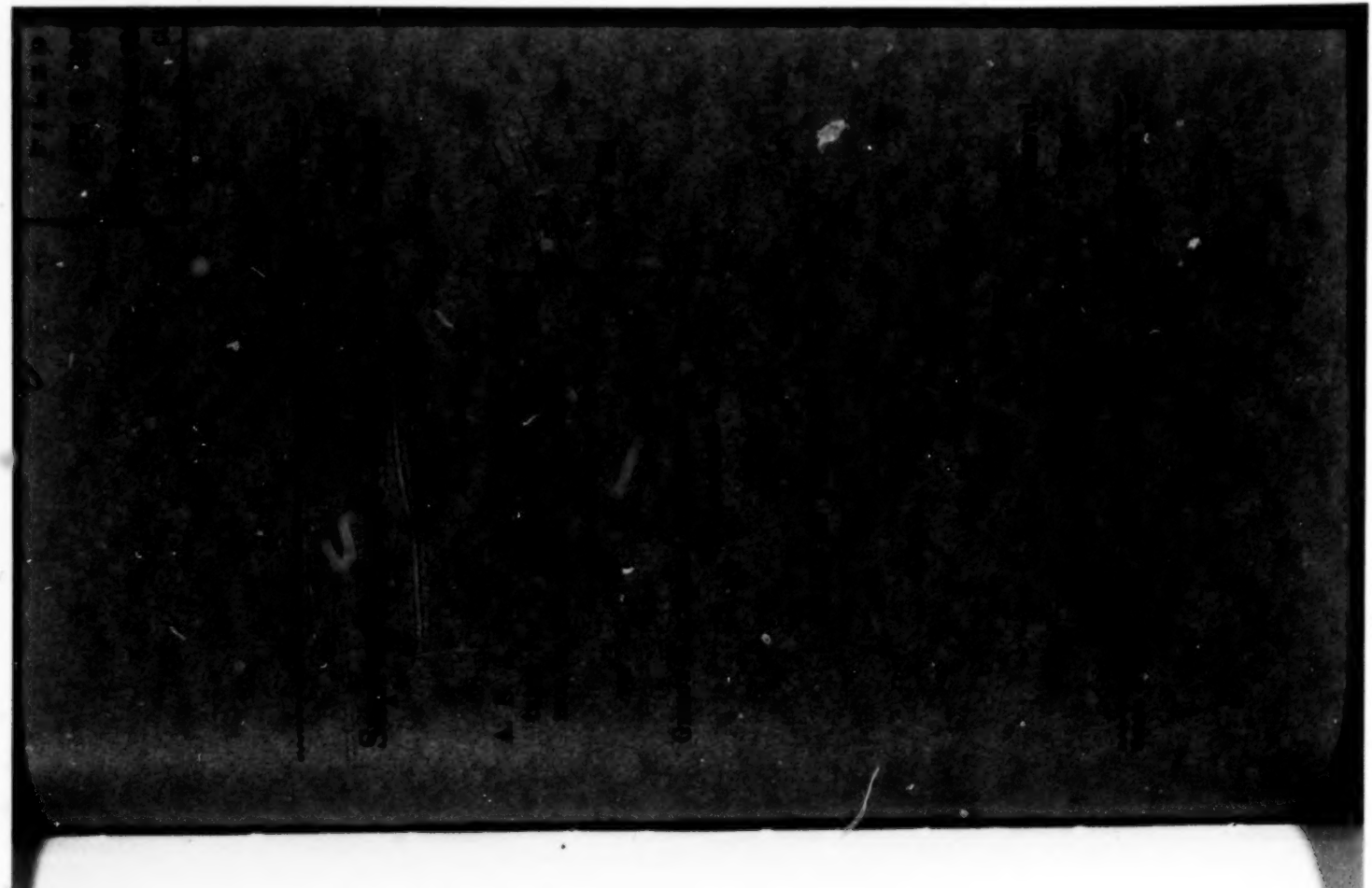

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(32,665)

Supreme Court of the United States

October Term 1927

A. S. J. SHAW, STATE AUDITOR, Substituted for C. C. CHILDERS, STATE AUDITOR OF THE STATE OF OKLAHOMA,
Plaintiff in Error,

vs.

GIBSON-ZAHNISER OIL CORPORATION ET AL.,
Defendants in Error.

No. 234

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

Miller Tiger, a full blood Creek Indian, received his allotment and thereafter a departmental oil and gas lease was executed, covering the same. The royalties therefrom were paid to the Superintendent and Special Disbursing Agent for the Five Civilized Tribes.

On July 26, 1915, Miller Tiger, who was a minor, through his guardians, Rosanna Brown and Barclay Morgan, requested the County Court of Okmulgee County to invest the sum of $3,000 of these royalties in 160 acres of

agricultural land in Okfuskee County, Oklahoma. Upon a hearing the court authorized the purchase of said land, and on October 24, 1915, the Superintendent of the Five Civilized Tribes purchased said land out of the royalties in his hands by a check drawn upon the Miller Tiger fund payable to his said guardians, and said check was by said guardians deposited in their general guardianship account in bank. On the same day the guardians drew their check against said account in favor of the vendor and delivered it to him in payment of the purchase price of the land. In the meantime, on July 26, 1915, the special form of deed had been executed in accordance with the conditions exacted by the department and by the court, with the clause that said land should not be alienated or leased during the lifetime of the grantee prior to April 26, 1931, without the consent of and approval by the Secretary of the Interior.

On February 10, 1919, Miller Tiger executed a departmental oil and gas lease on the land so purchased to G. L. Sandlin, which lease was thereafter assigned to E. L. Robinson and Gibson-Zahniser Oil Corporation, defendants in error herein. Operating under said lease, defendants in error have produced oil upon which the State Auditor of Oklahoma has levied and assessed gross production taxes in the total sum of $20,923.01, which said taxes were paid the State Auditor by defendants in error under protest, and this suit was instituted to recover the same.

Prior to the purchase of said land for Miller Tiger, the same was owned by C. L. Nelson, a non-Indian citizen, and such land was legally subject to state, county and municipal taxation while so owned. Since the purchase of said land for Miller Tiger, for the years 1916-1925, inclusive, ad valorem taxes on such land have been paid the County Treasurer of Okfuskee County by the United States Indian Agency at Muskogee, Oklahoma, and the said Miller Tiger still owns his original allotment in Okfuskee County, Oklahoma.

The judgment was for defendants in error in the trial court, and the matter was presented to the United States Circuit Court of Appeals for the Eighth Circuit on writ of error, and the Circuit Court of Appeals has certified the questions herein involved to the Supreme Court of the United States for its consideration.

The question to be determined in this case is whether the oil produced as above may be withdrawn from the taxable property of the State of Oklahoma. As stated by the Circuit Court of Appeals, the question certified are as follows:

Question 1. Had the Secretary of the Interior, on October 24, 1915, when this land was purchased, power to exempt from such state taxation land purchased under his supervision for a full blood Creek Indian with trust funds of that Indian, where the land so purchased was, at that time, subject to all state taxes?

Question 2. Is this tax a forbidden tax upon a Federal instrumentality?

We will confine our brief to the consideration of the questions so certified in the order set forth in the certificate.

ARGUMENT AND BRIEF.

I.

Had the Secretary of the Interior, on October 24, 1915, when this land was purchased, power to exempt from such state taxation land purchased under his supervision for a full blood Creek Indian with trust funds of that Indian, where the land so purchased was, at that time, subject to all state taxes?

The decision of this case largely depends upon the construction to be given to the Act of May 27, 1908, 35 Statutes at Large 312. It is provided, in part, by Section 1 of said act:

> "Except that the Secretary of the Interior may remove such restrictions wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe, etc."

It is provided by Section 4 of that act as follows:

> "That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens, as though it were the property of

other persons than allottees of the Five Civilized Tribes."

That part of the act which has reference to the authority of the Secretary of the Interior with regard to royalties is as follows:

> "Section 2. That all lands, other than homesteads, allotted to members of the Five Civilized Tribes, from which restrictions have not been removed, may be leased by the allottee, if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal; provided, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior under rules and regulations provided by the Secretary of the Interior and not otherwise."

There is no express provision in the Act of May 27, 1908, exempting from taxation the royalties arising from restricted lands or the properties in which such royalties may be invested. It is, however, contended by defendants in error in this case that so long as the Secretary of the Interior sees fit to do so he may invest such royalties for the benefit of the allottee in lands and thus make them and the oil produced therefrom such a Federal instrumentality as to withdraw the same body of taxable property within the state.

The power of Congress to provide for this we question:

but, nevertheless, the question as to whether or not Congress has so provided is one required to be answered in this cause.

It will be of great assistance, we believe, in determining this question, to consider the situation which Congress had before it at the time of enacting this act. As is well known to this Court, prior to that time the lands comprising what is now all of the eastern part of the State of Oklahoma had been allotted in severalty to the members of the Five Civilized Tribes. In each of the nations the allotment acts provided certain restrictions upon alienation and certain exemptions from taxation. The first act removing restrictions from alienation was that of April 21, 1904, permitting alienation of surplus allotments of allottees who were not of Indian blood, except minors, and permitting the secretary to remove restrictions as to other allottees except as to the homesteads and except minors.

There had been some removal of restrictions by operations of law by reason of the expiration of the period of restriction prescribed in the allotment acts, particularly in the Creek Nation. There were likewise some allotments selected on behalf of allottees dying before allotment, which in the hands of the heirs were not restricted. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

In 1906 Congress had passed an act purporting to pro-

vide for the final disposition of the affairs of the Five Civilized Tribes, in which it was provided that "all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

Act of April 26, 1906, Stat. at L. 137, Section 19.

Subsequent to the enactment of this act the State of Oklahoma was erected, and in November, 1907, the State was admitted to statehood. It became immediately apparent that the large body of land on the eastern side of the State which was exempt from taxation made it impossible for the state and county governments to procure sufficient revenue with which to provide for the expense of the government. This situation was brought to the attention of Congress, and the Act of May 27, 1908, resulted therefrom. The report of the Committee of Indian Affairs upon the bill which subsequently was enacted into this law was illuminative as to the purpose and intent of Congress in enacting this legislation. Therein it is said:

> "Under existing law all land allotted to these Five Tribes by previous acts of Congress is inalienable and non-taxable, except that the Secretary of the Interior under such rules and regulations as he may prescribe may remove the restrictions against the alienation of the land which was allottted to persons of less than one-half Indian blood. These Five Tribes occupy practically all of that country formally designated and known as Indian Territory, now a portion of the State of Oklahoma, comprising nearly one-half of the entire

State. Since the admission of Oklahoma to the Union, that part of the State has been divided into counties and subdivided into townships, school districts, etc. There has been elected a full set of county officers in each county, township officers in each township, and school district officers wherever school districts have been organized. The only taxable real estate is that continued (*sic*) within the corporate limits of cities and towns, and real estate outside where restrictions have been removed and where the Indian has disposed of his land.

"As appears by another page of this report, restrictions have been removed on 3,028,196.58 acres on the 24th day of December, 1907, but less than half of this amount had been alienated. There has been since that date some removal of restrictions and some additional sales.

"It will be readily observed from the foregoing statement that there is little taxable property in that portion of the State of Oklahoma except personal property and real estate in the corporate limits of cities and towns. The meaning of this is that there is a government, state and local, to support, with practically no real estate upon which there may be a levy for taxable purposes. The cities are required to bear the expenses of county and state government with the exception of personal property and small per cent of the outside real estate mentioned in the preceding paragraph. This leaves a portion of the people of that State bearing all of the burdens of taxation, and relieves another —the most wealthy of the people of the State—from any of the burdens of taxation. The result is that it is impossible to support schools except in the extreme wealthy sections more than two or three months in the year. For those persons who are taxed the per cent of taxation is enormously high—almost unbearable."

Further on, the report of the committee said:

"There is a limit to the amount of taxes that the small portion of the people now bearing this burden can stand, and unless provision is made whereby the lands in the Five Tribes may be taxed, there can be no adequate public school system, necessary bridges cannot be constructed, public roads cannot be opened and improved, and the county and district government cannot be properly conducted. Thus the development of this portion of the State would be further hampered.

"The Indian citizens are now enjoying the same privileges and benefits of state and local government in Oklahoma as the white citizens. Besides affording relief to all of the citizens of the State this bill should prove a benefit to the Indian allottees, as they are the large property owners and would have the advantage of the increased valuations that would come within the development of the resources of their portion of the State through the ending of the lease system, the equalizing of taxation, and the establishment of efficient public schools, good roads, and the other benefits of local government."

See Report No. 1454, 2 House of Representatives Report 60th Congress, 1st Session 5226.

It will thus be seen that the chief purpose which Congress had before it in enacting this act was to release from exemption from taxation a large body of the land lying within the five nations, and to enable the State to tax such lands for the support of the state and county governments. It would seem, therefore, that in construing this act the rule of general application that an exemption from taxation

will not be presumed unless expressly granted, should be peculiarly applicable, for it is inconceivable that with the purpose in view of releasing this land for taxation, Congress should grant to the Secretary of the Interior authority by investing royalties received from these leases in such taxable land, thereby to withdraw it and the oil embedded thereunder again from taxation, unless it had expressly so stated in the act. To give the act this construction, we submit, would be to close our eyes to the situation which confronted Congress and to the purpose it had in releasing these lands from restriction.

Furthermore, the departmental construction of the act at the time soon after its passage and for a long time subsequent thereto, and in fact until recent years, was in accord with this view. The Secretary of the Interior, pursuant to the provision of the act, prescribed rules and regulations governing the leasing of restricted land.

Pursuant to Act of Congress of May 27, 1908, the Secretary of the Interior promulgated certain rules and regulations governing the leasing of restricted Indian lands and the investment of royalties derived therefrom in other property.

Rule 20 prescribed by the Secretary of the Interior is as follows:

"In any case where lands are purchased for the use

and benefit of any citizen of the Five Civilized Tribes of the restricted class, payment for which is made from proceeds arising from the sale of restricted allotted land, or other monies held under the control of the Department of the Interior, the Superintendent of the Five Civilized Tribes shall cause conveyance of such lands to be made in the form of conveyance containing an *habendum* clause against alienation or incumbrance until April 26, 1931, as follows:

" 'To have and to hold said described premises unto the said grantee * * * heirs and assigns, forever, free and clear and discharged * * * of all other former grants, charges, taxes, judgments, mortgages and other liens and incumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting land herein described, or the title thereto, executed during the lifetime of said grantee, at any time prior to April 26, 1931, shall be of any force and effect, or capable of confirmation or ratification, unless made by the consent of and with the approval of the Secretary of the Interior.' "

It should be noted that the only authority which the Secretary of the Interior is given over these royalties by the Act of 1908 is such as was given him by the provision we have above quoted—that is, such as it might be held arises from the power given him to approve these leases under such rules and regulations as he might prescribe. But this surely did not give him the power or the authority, even though it be deemed sufficient to authorize the investment of these funds in real estate, to exempt such real estate or oil produced therefrom from the payment of taxes.

Nor has the Secretary of the Interior construed said act to authorize him to exempt property so purchased from taxation, and the secretary has made no effort in the instant case to exempt the property from taxation.

Consequently we find that nowhere in the Act of Congress of May 27, 1908, or elsewhere, is specific authority given by Congress whereby the Secretary of the Interior may exempt from state taxation land purchased with proceeds of royalties from restricted land or oil produced from such land so purchased.

The fact that Miller Tiger is an Indian is not of itself sufficient to show exemption. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens—that is, that no exemption exists by implication, but must be clearly manifested.

Goudy v. *Meath*, 203 U. S. 146, 51 L. ed. 130.

A. The power of the Secretary of the Interior to restrict Miller Tiger's land against alienation considered.

It will be noted from a consideration of Section 2 of the Act of Congress of May 27, 1908, quoted from, that the Secretary of the Interior may consent to the leasing of a restricted homestead for oil and gas purposes under such rules as he may prescribe. The act itself does not specifically authorize the secretary to invest the royalties

arising from such lease into other land or to place a restriction against voluntary alienation upon lands so purchased.

It will be noted further that by said section no power is given the Secretary of the Interior to dispose of the proceeds derived from such leases. Under the terms of said act he may only *lease said land under such rules and regulations as he may prescribe.*

We are not unmindful of the holding of the Circuit Court of Appeals for the Eighth Circuit in the case of *United States* v. *Brown,* 8 Fed. (2nd) 564, that the particular land from which the oil in question in this case was produced was validly restricted against voluntary alienation by Miller Tiger. Also, in the case of *Brown* v. *United States,* 270 U. S. 644, 46 Supreme Court Reporter 210, the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit in said case was denied. However, we do not understand that this amounted to a decision by the Supreme Court of the United States that the land so purchased for Miller Tiger was validly restricted against voluntary alienation, but only that the court declined to allow the application for writ of certiorari.

We have been unable to find any decision by this Court holding that where royalties are derived from the allot-

ment of a Creek Indian and deposited in the general guardian's account for such Indian and thereafter invested in real estate, that the land so purchased may be validly restricted against voluntary alienation.

This court, in *Sunderland* v. *United States,* 266 U. S. 226, 69 L. ed. 259, held that Section 1 of the Act of Congress of May 27, 1908, authorized the Secretary of the Interior to impose a restriction against voluntary alienation upon lands purchased for an Indian with funds derived from a sale of his allotment. Said case, however, deals with the power of the Secretary of the Interior over funds derived from the sale of the allotment itself, and, as we have seen, no authority in that respect, is governed by Section 1 of the Act of Congress of May 27, 1908, which permitted the secretary to remove restrictions against alienation "under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians, as he may prescribe". There is reason for holding that where the secretary may make rules for the disposal of the proceeds of the sale of an allotment, that he may by virtue of such authority restrict land purchased with such fund. However, his authority over royalties derived from a lease of such allotment extends only to the leasing of said property for oil and gas purposes under such rules and regulations as he may prescribe. We believe there is ground, therefore, for distinguishing this case from

the holding of this Court in *Sunderland* v. *United States*, *supra*. Clearly, if Congress had intended that the secretary's control of these proceeds should extend to property in which they might be invested, it would have so stated specifically and expressly in the act, as it did in the clause providing for his supervision and control over the proceeds of the sale of the allotments of full blood Indians.

Furthermore, it is shown by the agreed statements of facts in this case that the Superintendent of the Five Civilized Tribes drew a check upon the Miller Tiger fund out of the royalties in his hand, payable to the guardians of Miller Tiger; that the guardians thereafter deposited said check in their general guardianship account in the bank, and co-mingled the funds so received from the Secretary of the Interior with the general guardianship fund held by them for Miller Tiger; that the land in question here was purchased by check drawn on the general guardianship account of Miller Tiger. In other words, there was not a direct investment of the funds held by the Superintendent of the Five Civilized Tribes into the land purchased for this Indian. It seems to us that this brings the case clearly within the scope of the decision of this court in the case of *McCurdy* v. *United States*, 264 U. S. 263, 62 L. ed. 706, There it was said:

> "Furthermore, in the case at bar it is not shown that the money released from the trust was invested

directly in property restricted as to alienation. Apparently Panther's money had been released six months before the deed to him was executed, and was used to pay for a conveyance of the land to Brenner as trustee for Robert and Emma Panther. * * * It is consistent with the facts shown that the restrictions upon alienation inserted in the deed was not a continuation of control reserved by the Secretary of the Interior, but a bringing under his control of a part of Panther's estate theretofore freed. In this respect and others the present case differs from *United States* v. *Thurston County,* 74 C. C. A. 425, 143 Fed. 287, much relied upon by the government. There is also a clear distinction between the present case and those like *United States* v. *Rickert,* 188 U. S. 432, 47 Law ed. 532, 23 Sup. Ct. Rep. 478, where it was sought to tax property, the legal title of which was in the United States and which was held by it for the benefit of Indians."

It is true that the money in the McCurdy case had been released six months before the deed to him was executed, but we do not consider that the question of the length of time the money is so comingled with other funds of the Indian is a distinguishing characteristic. It seems clear, therefore, that when the Secretary of the Interior paid over these funds to the guardians in this case the trust thereupon terminated, and even though the guardian did soon thereafter, or on the same day, check against the deposit made to their general account to the grantor, it cannot be said that the secretary directly invested the funds under his control in the land. When he paid the funds over to the guardians he lost control thereof. When he intrusted said

money to them, even though they did follow out his directions, he, it seems clear to us, terminated the trust and his control over this fund. If this be true, the restriction placed in the deed to Miller Tiger against the voluntary alienation of the land so purchased by his guardians was invalid and ineffective for such purpose. If such restriction against alienation was beyond the power of the secretary to make, it follows, of course, that the oil produced from the land purchased for this guardian would be subject to taxation.

B. The power of the Secretary of the Interior to exempt such land from taxation by the State of Oklahoma considered.

Assuming, without conceding, that the Secretary of the Interior had authority under Section 2 of the Act of Congress of May 27, 1908, to restrict the land purchased for Miller Tiger against voluntary alienation by him, yet, we believe, he did not possess the power to exempt said land theretofore taxable by the State from the taxable property of the State of Oklahoma. In fact, in *Sunderland* v. *United States, supra,* after holding that the Act of Congress of May 27, 1908, was sufficient to authorize the Secretary of the Interior to restrict alienation of land purchased with funds derived from the sale of an Indian's allotment, this court said:

> "The question is argued as though there had been an actual invasion of, or an interference with, the authority of the state to regulate and condition the trans-

fer of land within its boundaries. But there is no such invasion or interference. If Congress, in fulfillment of its duty to protect the Indians, whose welfare is the peculiar concern of the Federal government, deems it proper to restrict for a limited time the right of the individual Indian to alienate land purchased for him with funds arising from the sale of other lands originally subject to a like restriction, we are not aware of anything which stands in the way. *The State of Oklahoma is not concerned, since there is no state statute, rule of law or policy, which has been called to our attention, to the contrary effect. If there were, or if the power of state taxation were involved, we should consider the question of supremacy of power; but no such question is presented by this record.*"

In this case the State of Oklahoma is concerned, and has here asserted its power of state taxation, and, as the court said in the above case, the question of supremacy of power is involved. The above language is especially significant, in view of the previous holding of the Supreme Court of the United States in *McCurdy* v. *United States, supra,* and *United States* v. *Ransom,* 263 U. S. 691, 68 L. ed. 508. In the case of *McCurdy* v. *United States, supra,* the second and third paragraphs of the syllabus are as follows:

"Congress did not empower the Secretary of the Interior to exercise control over private property purchased with trust funds released by him to an Osage Indian allottee by the provision of the Act of April 18, 1912 (37 Stat. at L. 87, Chap. 83), paragraph 5, authorizing him in his discretion to pay to any Osage allottee, under rules and regulations to be prescribed by him, all or any part of the Osage trust funds held for the benefit of such allottee, when satisfied that such

payment would be to the manifest best interests and welfare of such allottee.

"Land purchased from their private owners with trust funds released to an Osage Indian allottee by the Secretary of the Interior under the authority of the Act of April 18, 1912 (37 Stat. at L. 87, Chap. 83), paragraph 5, and conveyed first in trust and later by the trustee to the Indian individually, could not be exempted from state taxation by a clause in the deed from the trustee making the land inalienable without the consent of the Secretary of the Interior."

In the opinion the court said:

"While an Indian is still a ward of the nation, there is power in Congress even to reimpose restrictions on property already freed; *Brader* v. *James*, decided this day (246 U. S. 88, *ante*, 591, 38 Sup. Ct. Rep. 285); but Congress did not confer upon the Secretary of the Interior authority to exercise such power under the circumstances of this case, or to give to property purchased with released funds immunity from state taxation."

Following the decision of the Supreme Court of the United States in *McCurdy* v. *United States*, *supra*, the cases of *United States* v. *Gray*, 284 Fed. 103, and *United States* v. *Ransom*, 284 Fed. 108, were decided by the Circuit Court of Appeals for the Eighth Circuit.

In the case of *United States* v. *Gray*, *supra*, the proceeds from the sale of restricted land of a Creek Indian were invested in lots within the State of Oklahoma, which had theretofore been subject to state taxation. The court considered the power of the Secretary of the Interior un-

der Section 1 of the Act of Congress of May 27, 1908, and held that he was without power under said act to purchase land with the funds derived from the sale of restricted lands and thereby exempt the lands so purchased from state taxation. The first and second paragraphs of the syllabus are as follows:

> "Provisions in a deed conveying property to an Indian, reciting that it was purchased with proceeds of restricted land and was not alienable by grantee during the restricted period, cannot affect the question whether or not the property is subject to local taxation.
>
> "Lots previously subject to taxation, purchased for a Creek Indian with money held in trust from the proceeds of restricted land, sold with approval of the Secretary of the Interior, pursuant to Act of May 27, 1908, paragraph 1, held not exempt from state taxation."

It will be observed that the power of the Secretary of the Interior in the case of United States v. Gray was determined by the same act of Congress as is applicable to this case. It was there contended that said Act of May 27, 1908, was sufficient to confer power upon the Secretary of the Interior to exempt from taxation land so purchased. In answer to such contention the following language was used by the Circuit Court of Appeals:

> "But the fact that funds arising from the sale of allotments are trust funds over which the secretary is given some power of disposition does not, in our judgment, give him a right, without more, to invest them in real estate. The established rule is to the contrary, 2 Perry on Trusts (5th ed.), paragraph 606

et seq.; much less can it be said that every such investment, *per se*, would withdraw the property purchased from taxation to which it had theretofore been subject. Counsel for appellant do not contend that that result would flow from the facts that have been stated, but rely in connection therewith on the clause in Section 1 of the Act of May 27, 1908, dealing with the removal of the restrictions against alienation of allotments, reading thus:

" 'Except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.'

"Conceding that he is thereby given authority, in disposing of the proceeds for the benefit of the Indian, to invest them in real estate, there is no suggestion or intimation of a legislative intention in that clause or section or act, or elsewhere, so far as we are advised, that the real estate so purchased shall become exempt. The subject of exemption was in mind when the clause relied upon was under consideration. The section of which it is a part dealt with the disposal of lands that were exempt, and if it was believed that the secretary was given power to reinvest those funds in other lands, it is to be assumed that they also would have been declared to be exempt or inalienable, if that was intended. Where the right to claim exemption is rested on a legislative purpose to grant it, Mr. Cooley says:

" 'The intention to exempt must in any case be expressed in clear and unambiguous terms.' Cooley on Taxation, p. 146.

"In *Goudy* v. *Meath*, 203 U. S. 146, 27 Sup. Ct. 48, 51 L. ed. 120, the court, in considering the question as to whether lands owned by an Indian were exempt from taxation, said:

> "'His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens—that is, that no exemption exists by implication but must be clearly manifested.'
>
> "We think the clause relied upon falls far short of disclosing any such purpose."

The case of *United States* v. *Gray, supra,* was appealed to the Supreme Court of the United States, and was dismissed by the Supreme Court for lack of jurisdictional amount required by paragraph 241, Judicial Code. See *United States* v. *Gray,* 263 U. S. 690, 68 L. ed. 508.

In the case of *United States* v. *Ransom,* 284 Fed. 108, the syllabus is as follows:

> "Lands, previously subject to taxation, purchased for a minor Creek Indian by her guardian, with approval of the Secretary of the Interior, with funds received as royalties under mining lease of her allotment, held not exempt from state taxation.

The facts in the Ransom case were practically the same as those in United States v. Gray, and the opinion of the Circuit Court of Appeals in the Gray case was made applicable to the Ransom case. The case of United States v. Ransom was presented to the Supreme Court of the United States in a writ of error to the United States Circuit Court of Appeals, and on January 21, 1924, the following per curiam opinion was rendered:

"Judgment affirmed upon the authority of the case of *McCurdy* v. *United States*, 246 U. S. 263, 62 L. ed. 706, 38 Sup. Ct. Rep. 289."

It has heretofore been contended by defendants in error that the case of *McCurdy* v. *United States, supra*, is distinguishable from the case here presented for the reason that the Act of Congress under which the Secretary of the Interior purported to act in the McCurdy case, relating to Osage Indians, was different from the Act of Congress of May 27, 1908, under which the secretary purports to act in the instant case. That this attempted distinction is without merit is shown by the fact that this court applied the principles of the McCurdy case to the case of *United States* v. *Ransom, supra*, and affirmed the Ransom decision on the authority of the McCurdy case. It is true that the Act of Congress in question in the McCurdy case is different from the one here under consideration, but nevertheless the Act of Congress of May 27, 1908, here under consideration, is the same act which was before the court in United States v. Ransom.

It has been urged that the McCurdy case stands for the proposition that the secretary, under the Act of Congress there in question, was without authority to restrict land purchased with the proceeds from restricted lands; however, we contend that the McCurdy case also held that the secretary could not purchase land with trust funds and

thereby exempt such land from state taxation, when it had theretofore been taxable by the State. This contention is strengthened by the fact that the case of United States v. Ransom was decided by the Supreme Court of the United States on January 21, 1924, and the case of *Sunderland* v. *United States, supra,* was decided on November 17, 1924, which later case sustained the power of the Secretary of the Interior to restrict land so purchased against voluntary alienation. Since the court had before it in both the Ransom and Sunderland cases the Act of Congress of May 27, 1908, and since in the Sunderland case it was held that the secretary did have power to restrict land so purchased against alienation, we believe it follows that the case of *United States* v. *Ransom, supra,* establishes the proposition that the secretary cannot thereby exempt such land so purchased from state taxation. In fact, we understand the language used by Mr. Justice Sutherland in the Sunderland case, to wit:

> "The State of Oklahoma is not concerned, since there is no state statute, rule of law or policy, which has been called to our attention to the contrary effect. If there were, or if the power of state taxation were involved, we should consider the question of supremacy of power; but no such question is presented by this record",

referred to the previous holding of the Supreme Court of the United States in United States v. Ransom, which had been decided some ten months prior thereto.

The conclusion to be reached from all of said cases is that, even if the Secretary of the Interior did possess the power to restrict land so purchased against voluntary alienation, nevertheless he was without power to exempt the same from state taxation.

The deductions which we seek to draw from the cases discussed above have also been drawn by the Circuit Court of Appeals for the Eighth Circuit in the case of *United States* v. *Mummert*, 15 Fed. (2nd) 926, the syllabus of which is as follows:

> "Land previously patented in fee simple can be taxed when purchased by Indians with consent of Secretary of Interior, with proceeds of restricted land held by the government for the use of said Indians, though deed contains restriction against alienation except with consent of Secretary of Interior."

In the opinion the following language is used:

> "All these lands were subject to state taxation before purchase for the use and benefit of the several Indian wards, as alleged in the bill. *This court is committed strongly to the view that lands formerly subject to taxation are not exempted therefrom by a purchase and holding of this nature. United States* v. *Gray* (C. C. A.), 284 Fed. 103; *United States* v. *Ransom* (C. C. A.), 284 Fed. 108; *United States* v. *Brown* (C. C. A.), 8 Fed. (2d) 564. The same rule is impliedly recognized in *United States* v. *Law*, 250 Fed. 218, 162 C. C. A. 354; *Sunderland* v. *United States* (C. C. A. 8) 287 Fed. 468.
>
> "It is true that in the Gray case reference was made to certain conditions by which that case differs from

the one at bar. The court said: 'The record does not disclose the amount for which the homestead was sold, nor whether she had other lands or property nor the value thereof, nor whether the two lots were purchased for her for residence purposes by her, nor whether they are rented and occupied for commercial or other purposes, or are vacant and unimproved, nor her necessities.'

"In the case before us it is alleged that the lands were purchased out of restricted funds for a home and for the maintenance, education, shelter and support of the family, including the children. However, in *United States* v. *Ransom, supra,* no such implied condition or distinction was stated. It is undoubtedly true that *United States* v. *Gray* and *United States* v. *Ransom, supra,* were largely bottomed upon the opinion of the Supreme Court in *McCurdy* v. *United States,* 246 U. S. 263, 38 S. Ct. 289, 62 L. ed. 706. It is to be noted that in the McCurdy case the Supreme Court had before it the Acts of June 28, 1906 (34 Stat. 539), and April 18, 1912 (37 Stat. 86), which dealt exclusively with the Osage Indians, and which contemplated freeing those Indians under certain conditions from governmental control. The opinion in that case recites that the trust fund with which the land was purchased had been released from governmental control prior to the purchase. Furthermore, by Section 7 of the Act of 1912, under which the McCurdy case arose, it is expressly provided that 'nothing herein shall be construed so as to exempt any such property from liability for taxes.' In the McCurdy case, which held the lands in question to be subject to state taxation, the cases of *United States* v. *Thurston County* (C. C. A. 8), 143 Fed. 287, 74 C. C. A. 425, and *United States* v. *Rickert,* 188 U. S. 432, 23 S. Ct. 478, 47 L. ed. 532, were distinguished because, in the latter case particularly, it was sought to tax property the legal title to which was in the United States and which was held by it for

the benefit of the Indians. In the case at bar the title is not in the United States, but directly in the Indians.

"In the very late case of *Sunderland* v. *United States*, 266 U. S. 226, 45 S. Ct. 64, 69 L. ed. 259, it was argued that, under the doctrine announced in McCurdy v. United States, Congress cannot authorize the Secretary of the Interior to impose restrictions on released Indian lands that have passed into private ownership; but the Supreme Court in its opinion modifies the doctrine sought to be deduced from the opinion in the McCurdy case with respect to restrictions against alienation of property purchased by way of reinvestment or otherwise with restricted trust funds, and the cases cited by appellant as to the continued trust nature of such funds into whatever form they may be converted and substituted, establish the continuance of that trust nature and the reason for it; but it is readily seen, as implied in the opinion in the Sunderland case, that although the interposition of the government is justified, to the end that the Indians be not overreached or despoiled in respect of their property, this does not necessarily imply that ordinary taxation for the benefit of the government, whose protection they enjoy, is calculated to despoil the Indian in respect of his property.

"The spoliation which the law aims to prevent is fraud and overreaching in the matter of alienation. There is contained in the Sunderland case, which goes far in recognizing the retention of governmental control over, and prohibitions against alienation of, lands purchased with restricted funds, the implication that it was not intended thereby to depart from the general rule with respect to state taxation of lands that theretofore had been subject thereto, unless such intention is made clearly to appear. The court says:

" 'The fact that land has become subject to jurisdiction of a state and exclusively within the control of

her laws does not prevent the United States from restricting for a limited time the right of a tribal Indian to alienate it, when purchased for him with funds derived from the sale of other lands originally subject to a like restriction. Such restriction not conflicting with any statute, rule of law or policy of the state, the question of supremacy of power does not arise.'

"And further:

" 'The State of Oklahoma is not concerned, since there is no state statute, rule of law or policy, which has been called to our attention, to the contrary effect. If there were, or if the power of state taxation were involved, we should consider the question of supremacy of power; but no such question is presented by this record.'

"There is in this language, we think, an implied recognition of the right of state taxation under situations such as are here presented. This accords with the view entertained by this court as announced in a number of cases. We think the County of Thurston, Nebraska, was not deprived of its right of taxation by the conveyances made, and that the decree below should be affirmed."

It should be understood that the State of Oklahoma readily concedes the wisdom of the governmental policy of protecting the Indians against their own improvidence and against the greed of the white man. This purpose is served by preventing the voluntary alienation of land by the Indians without the consent of the Secretary of the Interior. As pointed out above, there may be doubt as to the authority of the secretary under said act to restrict land purchased as here against voluntary alienation. We firmly

believe that Congress, in the Act of May 27, 1908, evidenced no intention of thereby enabling the Secretary of the Interior to purchase land formerly taxable by the State, and thereby exempt all of such property from state taxation. Certainly the act does not specifically so authorize him, and, as was said by Mr. Justice Stone in *Lewellyn* v. *Colonial Trust Company,* 72 L. ed. 29:

> "Tax exemptions are never lightly to be inferred" (citing cases).

There is another consideration which should be given to this matter in determining whether or not so great a power exists in the Secretary of the Interior. It is not claimed that his power of reinvestment of these funds is in any way circumscribed or defined by law, but the claim of power which is made for him is that the reinvestment of the funds is solely within his discretion. He is bound by no form of property, nor by its geographical location. If he can invest these funds in lands in Oklahoma, he can likewise invest them in lands in New York, or in any other state in the Union.

Furthermore, if he can by such investment exempt land and the oil produced therefrom by taxation by the State of Oklahoma, he could likewise purchase and exempt from taxation lands and the minerals therein in Pennsylvania, Colorado, or any other mineral producing state in the Union. The vast amount of monies held in trust for

the various tribes of Indians in Oklahoma from minerals produced on their lands is well known. If by their investment of such funds the Secretary of the Interior could withdraw the land so purchased from state taxation, he might purchase all of the property within the territorial limits of a state, or their municipalities, and render the same exempt from taxation and make absolutely impossible the support of any kind of government in such municipalities. In the absence of express authority in the Act of Congress to do this, such great power without limit should not be extended by implication. In this connection it should be borne in mind that Miller Tiger, the Indian for whom this land was purchased, still owns his original allotment in Oklahoma, from which allotment and the oil produced therefrom the State secures no contribution to the burdens of government. The purchase of the land here in question for Miller Tiger was for the purpose of investment only, and enjoys protection of the laws of the State of Oklahoma. We desire also to call attention here to the fact that the agreed statement of facts (Certificate, page 2) shows that since the purchase of said land for Miller Tiger for the years 1916 to 1925, inclusive, ad valorem taxes upon such land have been paid the County Treasurer of Okfuskee County by the United States Indian Agency at Muskogee, Oklahoma. This discloses that the Indian Agency has not construed the Act of Congress to entitle the land so pur-

chased for Miller Tiger to an exemption from state taxes. Neither Miller Tiger, nor the United States government for him, is here asserting that such land is exempt from state taxation. Only the defendant in error, a private corporation, organized for profit, is here claiming an exemption of the oil produced from Tiger's land, merely because they have a lease on his land. In other words, this corporation asserts for itself that it is entitled to an exemption from taxation because it dealt with Miller Tiger, when the Indian and his government for him pays state taxes on this very land. We do not believe a more liberal policy of exemption from taxation should be extended to the corporation, which produced oil from Indian land, than is extended to the Indian who owns the land.

When the question of the power of the Secretary of the Interior to place a valid restriction against voluntary alienation of the land in question was before the Circuit Court of Appeals for the Eighth Circuit in the case of *United States* v. *Brown*, 8 Fed. (2nd) 564, the court, though holding the restriction against alienation to be valid, recognized the right of the state to tax said land. In the opinion the following language is used:

> "But appellees urge the controlling effect of *McCurdy* v. *United States*, 246 U. S. 263, 38 S. Ct. 289, 62 L. ed. 706, and *United States* v. *Gray et al.*, 284 Fed. 103, and *United States* v. *Ransom*, 284 Fed. 108, decided by this court upon the authority of McCurdy

v. United States. In these cases it was held that provisions in a deed conveying property of an Indian, reciting that it was purchased with profits of restricted land, and was not alienable by grantee during the restricted period, could not exempt the property from local taxation. This is undoubtedly true, but that circumstance cannot affect the supervision of the government in other respects. Congress has no power to withdraw from taxation in this way lands that have once been subject to taxation. *United States* v. *Law*, 250 Fed. 218, 162 C. C. A. 354; *Sunderland* v. *United States* (C. C. A.), 287 Fed. 468. The McCurdy case presents three important considerations: First, it applies specifically to a special law governing the Osages. Second, the money which went to the purchase of new land had been released for a period of about six months before the repurchase, during which time it had not been subject to governmental control. Under the circumstances the repurchase was an independent transaction. Third, it announces that, while the Indian is still a ward, Congress has power to reimpose restrictions on property already freed, but not with the result of defeating local taxation, the right to which had attached."

Since the Secretary of the Interior had no authority to purchase the land from Miller Tiger theretofore taxable by the State of Oklahoma, and by such purchase exempt such land from state taxation, and since the Act of Congress of May 27, 1908, did not confer upon the Secretary of the Interior power to exempt property so purchased, we respectfully urge that the oil produced from the land of Miller Tiger in the instant case is subject to the gross production tax of the State of Oklahoma. Congress has nowhere

attempted to exempt such oil from such taxation, nor has Congress conferred, or attempted to confer, power upon the Secretary of the Interior to exempt such oil; nor has the Secretary of the Interior exempted or attempted to exempt such oil from state taxation; neither has this court ever extended an exemption from state taxation to land so purchased for an Indian with restricted funds, or to oil produced from such land.

II.

Is this tax a forbidden tax upon a Federal instrumentality?

In considering the above certified question, we desire, first, to look at the nature of the gross production tax law of Oklahoma to determine what kind of tax is imposed thereby; and, second, the effect of the taxes so imposed, if held to apply to the property of the defendant in error. We will consider those two matters in the order set out above.

A. The gross production tax of the State of Oklahoma is a property tax and is not in effect an occupation tax.

The gross production tax levied against the property produced by defendants in error in this case is provided for by Section 9814, Compiled Oklahoma Statutes 1921, which is in part as follows:

> "Every person, firm, association, or corporation engaged in the mining or production within this State of

asphalt or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other crude oil or other mineral oil or of natural gas, shall within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D. 1916, and of each quarter-annual period thereafter expiring respectively on the last day of June, September, December and March of each year, file with the State Auditor a statement under oath, on forms prescribed by him showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable, and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per centum of the gross value of production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this act * * *.

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude

oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine, and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation, for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time. * * *

"The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall take testimony to determine whether the taxes herein imposed are greater or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated * * *."

From said section of the Oklahoma statutes it will be observed that the gross production tax is levied upon the gross value of the production of petroleum or other crude or mineral oil, etc.; and that the same is also imposed *in full and in lieu* of all taxes by the State or its municipalities on such property. The above quoted section of the

Oklahoma statutes was passed by the Legislature of Oklahoma in 1916 and differs from the gross production tax act of the State of Oklahoma in 1908, in that the later act makes the gross production tax therein imposed in full and in lieu of any tax on the property by the State or its municipalities upon which the gross production tax is levied; whereas, in the Oklahoma Gross Production Act of 1908 said tax was *in addition to* the tax imposed by the State and its municipalities on the property so taxed.

In the case of *In re Skelton Lead & Zinc Company's Gross Production Tax for 1919*, 81 Okla. 134, 197 Pac. 495, the Supreme Court of Oklahoma, being the court of last resort in said State, construed the Gross Production Tax Act of 1916 to be the imposition of a property tax upon the property against which the same was levied and not to be an occupation or privilege tax. The following language is taken from said opinion:

> "We fully realize that the State has no power to levy an 'occupation tax' upon an agency of the government, and, as a matter of fact, it has never sought to exercise such power, but we hold that it does have authority to levy a 'property tax' upon the private property of the agent—when such property has a situs within the State.
>
> "There is no excuse for a confusion of the two kinds of taxes, 'occupation taxes' and 'property taxes'. They are separate and distinct species of taxes as distinct from each other in their kind and in their mission as tort and assault. A tax is an 'occupation tax' or a

'property tax' according to what it actually is, the same as a lens is concave or convex, or a coin is silver or gold. They are essentially different, in both their character and their mission. The sole mission or function of a 'property tax' being to raise revenue, and when the revenue is collected its mission is fulfilled. It never imposes any conditions nor places any restrictions upon the use of property, or the exercise of a privilege. The mission of a 'license tax', 'occupation tax', or 'privilege tax', or by whatever name this species of tax may be called, is always to regulate a given business, or control the right to engage in a given occupation. It is imposed as a condition or as an element of the conditions, upon the right to exercise a given privilege, its primary mission being to regulate and control; and, while the tax itself may not always be the sole condition, yet its payment is invariably made a part or a factor in the conditions upon which a business may be conducted by the statute under which such tax is levied. In other words, the primary object and purpose of every statute which levies an 'occupation tax' is to regulate the conduct of the business affected.

"The kind of a tax or the species to which it belongs, is not made by giving it a name, nor its species changed by changing its name, either by legislative enactment or by judicial decree. It is a 'property tax' or an 'occupation tax', according to the mission given it by the law under which it is levied.

"The power to levy the two taxes is derived from different sources of government—the 'occupation tax' from the police power to regulate, while the 'property tax' is from the power to raise revenue. The validity of the two taxes is tested and determined under different principles of law. The validity of an 'occupation tax' is determined by the question whether a state has the power at all to levy such a tax—whether it is at

all within the police power of a state to impose such a tax, with its attendant regulatory conditions. The validity of a 'property tax' is not determined by whether a state has power to levy such a tax, because such power is inherent, the power to raise the necessary revenue for government being inherent in the very fact of government itself, and the validity of such a tax is determined by the law governing its rate, its uniformity, its reasonableness or excessiveness, or whether it is discriminatory or confiscatory, or whether the manner of its assessment and collection is regular or irregular or constitutes 'taking without due process of law', or amounts to 'denial of equal protection' under the law. The basis of an 'occupation tax' lies in the police power to regulate, but the basis of a 'property tax' is inherent in the very fact of governmental protection of property. The fact that the proceeds of an 'occupation tax' may constitute a portion or the sole source of revenue does not change its mission, nor make it any the less an 'occupation tax'. Nor does the fact that an 'occupation tax' is levied upon an ad valorem basis render it any the less an 'occupation tax'. This method is quite frequently adopted, and in some cases might be the most just and reasonable measure for such a tax. Both kinds of taxes may be levied upon the same property, and both be levied upon an ad valorem basis, and both be valid. Or both may be invalid, the 'property tax' because it is excessive or discriminatory, and the 'occupation tax' because the State has no power to levy it. Neither does the fact alone that a given tax may be a burden upon a given business constitute a test as to what kind of a tax it is nor does the amount or weight of such burden alone constitute a test as to its validity. A tax may be a very onerous burden and still be perfectly valid, or it may be so very slight as to constitute no perceptible burden, and yet be wholly invalid; nor does the fact alone that the weight of such burden be indirectly upon a Federal agency either

change the character of the tax or constitute an exclusive test as to its validity. See *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 374; *Western Union Tel. Co.* v. *Attorney General of Mass.*, 125 U. S. 550-51. For further illustration: In *Thomas* v. *Gay*, 169 U. S. 264, a tax of 24 mills on the dollar levied by the Oklahoma Territory upon cattle grazed upon an Indian reservation under Federal lease was held to be a valid tax because it was a 'property tax' within the proper scope of the power to raise revenue; and yet, if the Territory had sought to impose a tax of one-tenth of one mill upon the mere right to graze cattle upon such reservation, the payment of such tax being made a condition upon the mere right to exercise such Federal agency, such tax would at once have been declared invalid, yet the burden of such tax upon such Federal instrumentality would have been only 1-240 part as heavy as the tax which the court held to be valid, the reason being that the lighter tax was one which in the very nature of our dual form of government a state has no power to levy, it being an 'occupation tax', while the other tax, the 'property tax', though 240 times as great, was held to be valid, being upon the lessees' private property having a taxable situs within the Territory. The same questions were involved and same decision rendered in *Wagoner* v. *Evans*, 170 U. S. 588.

"Upon the same principle, the 'net proceeds tax' of Nevada was held to be valid in *Forbes* v. *Gracey*, 94 U. S. 762.

"And the Colorado 'gross products tax' upon mining claims from the government was upheld in *Elder* v. *Wood*, 208 U. S. 225-7.

"Upon the same principle the 'gross receipts tax' of Minnesota was upheld in *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335.

"And in *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, the Porto Rican tax was held to be valid.

"Therefore, the weight of a tax, or its effect in dollars and cents, is not of itself a test of its validity, nor of its kind.

"A 'property tax' constitutes a burden upon a given business only to the extent of the amount of the tax, but an 'occupation tax' with its ancillary conditions, if not paid, may stop the business altogether. We must conclude, therefore, that the present tax is a 'property tax'."

In the case of *In re Protest of Bendelari, Agent, Gross Production Tax 1919,* 82 Okla. 97, 198 Pac. 606, the Supreme Court of Oklahoma again considered the nature of the tax imposed by the 1916 Gross Production Tax Law, and held that said gross production tax was a commutation property tax and not an occupation tax. We quote the following from said opinion:

"We will now direct our attention to the other question: Whether the gross production tax provided in Chapter 39, Session Laws of 1916, is illegal. In doing this, it can best be determined by ascertaining whether the same is a property tax, or a tax upon the earnings of the company, or a license or occupation tax. In determining whether the same is a property tax or a license or occupation tax, we must look to the entire law upon the subject of taxation and the whole method provided for taxation.

"Section 7302, Rev. Laws 1910, provides that all property within the State, except such as is exempt, shall be subject to taxation. The Legislature thereafter passed what is known as a gross production tax

concerning mining property, and provided that this tax should be in lieu of all other taxes. The fifth paragraph of Section 1, Ch. 39, Session Laws 1916, provides as follows:

" 'The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, * * * upon the machinery, appliances and equipment used in and around any well * * *.'

"This tax is made in lieu of taxes upon all of the property except the real estate which is covered by the lease, and except the ore on hand on the date the property is assessed for general ad valorem taxes, and provides these two classes of property shall be taxed as other property within the taxing district in which said property is situated at the time. Paragraph 6 then provides that:

" 'The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall take testimony to determine whether the taxes herein imposed are greater, or less, than the general ad valorem taxes for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated.'

"The paragraph further provides that the State Board of Equalization may lower or raise the rate to conform thereto. The force and effect of this provision of the law is to tax the property upon an ad valorem basis, and if the producer considers that the amount he pays in the way of a gross production tax at the rate provided for in said section is greater than the tax on his property would be if taxed to him upon an ad valorem basis, he may submit proof of this

question to the State Board of Equalization, and the State Board of Equalization may reduce the rate and thereby prevent him from being discriminated against. In other words, there shall be no discrimination in the taxation of this class of property from other classes of property that are taxed upon an ad valorem basis. It is conclusive that the intent of the Legislature was to make this tax a property tax and based upon the valuation of the property at the same rate as other property, and the same must be considered a property tax. It is simply a method to arrive at a property tax, and in its final analysis it is nothing more nor less than a property tax.

"The identical question was presented to the Supreme Court of Minnesota in the case of *State* v. *U. S. Express Co.*, 114 Minn. 346, the court there stating as follows:

" 'The gross earnings tax provided by R. L. 1905, Secs. 1013-1019, is not a tax upon the earnings of express companies, or upon the companies, or their right to engage in business, but is a tax upon their property within the state.'

"An appeal was taken from a decision of the state court to the United States Supreme Court, being entitled *United States Express Co.* v. *Minnesota*, 223 U. S. 335, and the court there stated as follows:

" 'A state may not burden interstate commerce by taxing its commerce, but it may measure the value of property of a corporation engaged in interstate commerce within the state by the gross receipts, and impose a tax thereon if the same is in lieu of all taxes upon the property of such corporation.'

"In the body of the opinion the court stated as follows:

" 'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon

property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697. See *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 438, 439.

" 'The question is whether this is such a tax. It appears sufficient, perhaps, from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is now without sense. When a Legislature is trying simply to value property it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That this must be done by this court as best it can.' * * *

" 'The statute itself provides that the assessments under it "shall be in lieu of all taxes upon its property". In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the state to tax the property of express companies as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all. In this connection, the language of Mr. Justice Peckham, in *McHenry* v. *Alford*, 168 U. S. 651, 671, while it was not necessary to the decision of the case, is, nevertheless, apposite:

" ' " 'When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a

tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings." * * *

" ' "Doubtless, no state could add to the taxation of property, according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

" 'We think the tax here in question comes within this principle. There is no suggestion in the present record, as was shown in *Fargo* v. *Hart*, 193 U. S. 490, that the amount of the tax is unduly great, having reference to the real value of the property of the company within the state and the assessment made. The statute embraces receipts from all the business done within the state, including much which is purely local:

" 'Upon the whole, we think the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not, in itself, be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the state.'

"If we apply the same reason to the facts in the case at bar, it would seem that the state in good faith has attempted to place a tax upon the property of those engaged in mining, and has adopted this method and means in lieu of the ad valorem tax, and that the same should be a property tax based upon the value of the property, and be a property tax. There is no contention in this case that the tax imposed is larger in proportion to the value of the tangible property of the company upon the lease subject to taxation than if it were assessed upon an ad valorem basis at the same rate other property in the same taxing district is assessed at.

"We must, therefore, conclude that the same is not a tax upon the earnings of the company, but simply a tax upon the property of the producer that is subject to taxation.

"When the state has provided this method of taxation, and provided that the tax shall be in lieu of all other taxes, and has placed around the taxpayer the safeguard that if the rate of taxation is greater than if paid upon an ad valorem basis, the State Board of Equalization may reduce the rate, certainly with this provision in the law there can be no contention that the producer is being discriminated against, nor that the state is attempting to exact an exorbitant tax from him."

The Supreme Court of the United States, as well as the United States Circuit Court of Appeals, will abide by the decision of the highest court of a state in construing a tax statute as to whether it imposes a property or a license tax.

In *Brown-Forman Company* v. *Kentucky*, 217 U. S. 563, 54 L. ed. 883, the second syllabus is as follows:

"The construction by the highest state court of the tax imposed by the Kentucky Act of March 28, 1906, upon persons engaged in compounding, rectifying, adulterating or blending distilled spirits, as being a license or occupation tax, and not a property tax, will be followed by the Federal Supreme Court."

From the opinion in said case the following is taken:

"It has been urged that the tax is not imposed as a license upon the doing of business, but is laid upon the goods produced, and is therefore arbitrary and discriminatory as one not imposed upon all other like kinds of liquor, whether produced in or out of the state. * * *

"*But the Kentucky Court of Appeals has construed the act as not a property tax, but as one imposing a license or occupation tax upon the business.* * * *Such a construction and interpretation of the statute here involved, by the highest court of the state, should be accepted as definitely determining that the tax complained of is not a property tax, but a license tax imposed upon the doing of a particular business plainly subject to the regulating power of the state.*"

See, also, *Westinghouse Electric Manufacturing Co.* v. *Binghampton Railway Co.*, 255 Fed. 413.

In the case of *United States Express Company* v. *Minnesota*, 223 U. S. 335, 56 L. ed. 459, the statute of Minnesota levied a 6% gross receipts tax on the express company, and the same was claimed to be illegal as interfering with the power of the government to regulate interstate commerce. The tax was sustained and the court drew the distinction between a case where there was a tax levied on

interstate commerce and where the income from the same was used merely for the purpose of valuing the property for state taxation. The court also emphasized the fact that the taxes imposed by the state statute of Minnesota provided that they "shall be in lieu of all taxes upon its property". After referring to the case of *Railway Company* v. *Texas*, 210 U. S. 217, and the case of *Meyer* v. *Wells Fargo Company*, 223 U. S. 298, the court said:

> "Appreciating the difficulty emphasized in the Galveston case of drawing the line between taxes that burden interstate commerce and those whereby the Legislature is simply undertaking to impose a property tax within its legitimate power, measured in part by the income from interstate commerce transactions, how does the present case stand? The Supreme Court of Minnesota construed the tax to be a property tax, measured by the gross earnings within the state, which, under their construction of the tax, included the earnings here in question. That court held that the statute was part of a system long in force in Minnesota, passed under the authority of the state constitution, and was intended to afford a means of valuing the property of express companies within the state. *While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law.*"

In *Adams Express Company* v. *Ohio*, 166 U. S. 185, the gross receipts tax of the State of Ohio on express companies was sustained. Of the statute there under consideration the court said:

> "Now the taxes imposed upon express companies by the statutes of the three States of Ohio, Indiana and Kentucky are certainly not in terms of 'privilege taxes'. They purport to be upon the property of the companies. They are, therefore, not, in form at least, subject to any of the denunciations against privilege taxes which have so often come from this court. *The statutes grant no privilege of doing an express business, charge nothing for doing such a business and contemplate only the assessment and levy of taxes upon the property of the express companies situated within the respective states.*"

So it is of the 1916 Gross Production Act of the State of Oklahoma here in consideration. This statute grants no privilege of doing an oil and gas business, charges nothing for the doing of such business, and contemplates only the assessment and levy of taxes upon the oil and gas produced by oil companies situated within the State of Oklahoma.

We are not unmindful of the holding of the Supreme Court of the United States in the case of *Choctaw, Oklahoma and Gulf Railroad Company* v. *Harrison,* 235 U. S. 292, 59 L. ed. 234, to the effect that the Oklahoma Gross Production Tax Law of 1908 levies an occupation tax. However, we call the court's attention to the fact that the Oklahoma statute under consideration in *Choctaw, Oklahoma and Gulf Railroad Company* v. *Harrison, supra,* made the taxes in question *in addition to* the taxes levied upon the property affected by said Gross Production Tax Act,

whereas the Gross Production Tax Act of 1916, now under consideration, levies the taxes *in full and in lieu of* all other taxes on property so taxed. This distinction in the two laws is emphasized by the holding of this court in *United States Express Company* v. *Minnesota, supra,* wherein it was pointed out that the tax statute there in question levied a tax in lieu of all other taxes upon the property. It is apparent that the 1916 Gross Production Tax Law was passed to conform to the decision of this court in *Choctaw, Oklahoma and Gulf Railroad Company* v. *Harrison, supra.*

Furthermore, as pointed out above, the court of last resort of the State of Oklahoma holds the tax imposed by the 1916 Gross Production Tax Law to be a property tax and not an occupation tax, and unless this court is prepared to say that this conclusion is not well founded, it will adopt the interpretation of said statute by the court of last resort of Oklahoma.

Since, therefore, the gross production tax assessed against the property of the defendants in error in this case is not assessed upon the right of the defendants in error to do an oil and gas business in Oklahoma, and since it charges nothing for the doing of such business, but is levied and assessed upon the property of defendants in this State, and since the court of last resort of Oklahoma has construed said tax statute to levy a property tax, we

respectfully urge that this court should hold said statute to levy a property tax and not an occupation tax.

B. The imposition of the gross production tax upon the property in question does not constitute the imposing of a forbidden tax upon a Federal instrumentality.

Having established, as we believe, that the gross production tax of the State of Oklahoma is a property tax, and having seen that the Act of Congress of May 27, 1908, does not authorize exempting from taxation the oil produced by defendants in error, we may turn to the question as to whether the imposition of the gross production tax on the property in question constitutes the taxation of a Federal instrumentality in violation of the Constitution of the United States.

We desire first to review some earlier decisions of the Supreme Court of the United States.

In *Postal Tel. Cable Co.* v. *Adams*, 155 U. S. 687-8, Mr. Chief Justice Fuller said:

> "Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax for the privilege of using * * * an instrumentality of interstate commerce, * * * but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property * * * it is not open to attack as inconsistent with the Constitution."

In *Ficklen* v. *Taxing District*, 145 U. S. 22, Mr. Chief Justice Fuller distinguished the case at hand from the case of *Philadelphia Co.* v. *Pennsylvania*, 122 U. S. 326, but, referring to a statement made in the latter case by Mr. Justice Bradley, who delivered the opinion, Mr. Chief Justice Fuller said:

> "It is well settled that a state has power to tax all property having a *situs* within its limits, whether employed in interstate commerce or not. It is not taxed because it is so employed, but because it is within the territory and jurisdiction of the state. *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 (35, 613), 3 Inters. Com. Rep. 595; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (29, 158). And it has been often laid down that the property of corporations holding their franchises from the government of the United States is not exempt from taxation by the state of its *situs*. *Union Pac. R. Co.* v. *Peniston*, 85 U. S. 18 Wall. 5 (21, 787); *Thompson* v. *Union Pac. R. Co.*, 76 U. S. 9 Wall 579 (19, 792); *Western U. Teleg. Co.* v. *Massachusetts*, 125 U. S. 530 (31, 790)."

In *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 379, Mr. Chief Justice Holmes said:

> "We need say but a word in answer to the suggestion that the tax is an unconstitutional interference with interstate commerce. In form the tax is a tax on 'the property and business of such railroad corporation operated within the state,' computed upon certain percentages of gross income. The *prima facie* measure of the plaintiff's gross income is substantially that which was approved in *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217, 228, 35 L. ed. 994, 995, 3 Inters. Com. Rep. 807, 12 Sup. Ct. 121, 163. See, also, *Western*

U. Teleg. Co. v. *Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054."

In *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, a Texas statute which levied a tax upon gross receipts of interstate commerce was held invalid, but Mr. Justice Holmes, who delivered the opinion, said:

> "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution" (citing *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 687-8).

In *McHenry* v. *Alford*, 168 U. S. 651, Mr. Justice Peckham, in discussing the tax under consideration, said:

> "* * * When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

In *United States Express Co.* v. *Minnesota*, 223 U. S. 335, in sustaining a Minnesota statute which is exactly similar to the statute under consideration here, Mr. Justice Day, who delivered the opinion, sustained the Minnesota statute upon the authority of former decisions, among which he cited and quoted from *Postal Teleg. Cable Co.* v.

Adams, 155 U. S. 688; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Ficklen* v. *Taxing District*, 145 U. S. 1; *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 379; *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217; *Galveston H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217; *McHenry* v. *Alford*, 168 U. S. 651, quoting and relying upon the same language which we have above quoted.

In *Brown* v. *Spillman*, 155 U. S. 665, the court expressly held that the lessee's share of oil and gas, after it had been taken from the ground by the lessee, was then his personal property and subject to his control.

In *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, the same thing was held upon the authority of *Brown* v. *Spillman*, *supra*, the court citing, quoting and relying upon the reasoning in Brown v. Spillman.

In *Manuel* v. *Wulff*, 152 U. S. 505-6, Mr. Chief Justice Fuller held that mining claims upon government lands are property which might be sold, transferred, mortgaged and inherited, without infringing the title of the United States (citing *Forbes* v. *Gracey*, 94 U. S. 762, *supra*; *Belk* v. *Meager*, 104 U. S. 279, *supra*).

In *St. Louis Mining Co.* v. *Montana Mining Co.*, 171 U. S. 654, Mr. Chief Justice Fuller again held that a mining claim was the individual property of the owner of the claim, and that he might sell it, mortgage it, or part with

it as he saw fit (citing *Forbes* v. *Gracey*, 94 U. S. 762, *supra*; *Manuel* v. *Wulff*, 152 U. S. 505, *supra*).

In *Elder* v. *Wood*, 208 U. S. 226, the "gross product tax" law of the State of Colorado was sustained and the tax held to be valid. In this case it was contended that the "gross products tax" upon the mining claims and products from the mines granted by the United States was invalid for the reason that the operation of such mines was a Federal agency which the state had no right to tax. The opinion of the court was delivered by Mr. Justice Moody, holding that the property value of the claims and the products obtained from the mines were property belonging to the operator of the mines, the court saying:

> "Such an interest from early times has been held to be property distinct from the land itself, vendable, inheritable, and taxable" (citing *Forbes* v. *Gracey*, 94 U. S. 762; *Belk* v. *Meagher*, 104 U. S. 279; *Manuel* v. *Wulff*, 152 U. S. 505; *St. Louis Mining & Milling Co.* v. *Montana Mine Co.*, 171 U. S. 650).

In *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365-374, the court said:

> "A state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A state may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce, and yet, in both instances, the tax on the property in some degree affects its use."

Upon the authority of *Gibbons* v. *Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Morgan* v. *Parham*, 16 Wall. 471, the court based the conclusion above quoted.

In *Western Union Tel. Co.* v. *Attorney General of Mass.*, 125 U. S. 530-555, 31 L. ed. 794, in an opinion by Mr. Justice Miller, the court said:

> "It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The states are, and they must ever be, coexistent with the national government. Neither may destroy the other. Hence, the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise. * * * A very large proportion of the property within the states is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. So are steamboats, horses, stage coaches, foundries, shipyards, and multitudes of manufacturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the states, it is manifest the state

governments would be paralyzed. While it is of the utmost importance that all powers vested by the Constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited."

In *Central Pacific R. Co.* v. *California,* 162 U. S. 9, Mr. Chief Justice Fuller, quoting from *Union Pac. R. Co.* v. *Peniston,* 84 U. S. 5, said:

> "It cannot be that a state tax (meaning a property tax) which remotely affects the efficient exercise of a Federal power, is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property."

In this case the court also cites and quotes with approval from *Thomson* v. *Union Pac. R. Co.,* 76 U. S. 579.

In *Utah & Northern R. Co.* v. *Fisher,* 116 U. S. 28; *Maricopa & Phoenix R. Co.* v. *Ariz. Ter.,* 156 U. S. 347; *Thomas* v. *Gay,* 169 U. S. 264; *Wagoner* v. *Evans,* 170 U. S. 588, the court expressly and squarely held that a state or territory had power to levy a "property tax" upon private property used under Federal authority upon Indian reservations.

In *Thomas* v. *Gay,* 169 U. S. 264, *supra,* the identical questions were presented and decided that are involved in the case at bar, and every question involved in the case at

bar was decided in Thomas v. Gay. In that case the Department of the Interior had leased to cattlemen the grazing lands of the Osage Indian reservation, and great herds of cattle, amounting to tens of thousands, were grazed upon the said lands. These reservations being attached to Oklahoma Territory for judicial purposes, the Territory sought to tax the cattle.

The cattlemen contended that such a tax was a violation of the rights of the Indians, and an invasion of the jurisdiction and control of the United States over that and other lands. In answer to this the court said:

> "As to that portion of the argument * * * that the territorial authorities have no right to tax property of others than Indians located upon these reservations, it is sufficient to cite the cases of *Utah & N. R. Co.* v. *Fisher,* 116 U. S. 28, and *Maricopa & P. R. Co.* v. *Arizona,* 156 U. S. 347."

It was also contended that to force the cattlemen to pay this tax would affect the price which they could pay for the lease right to graze. In answer to this contention the court said:

> "But it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. A similar contention was urged in the case of *N. Y., Lake Erie & W. R. Co.* v. *Pennslyvania,* 158 U. S. 431. There the State of Pennsylvania had imposed a tax upon a railroad * * * engaged in carrying on interstate commerce, and this tax was measured by reference to the

amount of tolls received. * * * It was claimed that the imposition of a tax on tolls might lead to increasing them * * * and * * * become a tax charge upon interstate commerce, but this court held that such a tax upon tolls was too indirect and remote to be regarded as a tax or burden upon interstate commerce."

The court further cites *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150, where the same contention was made, and wherein the court said:

"The fact that the tax in question was to some extent affected by the amount of tolls received, and therefore might be supposed to increase the rate of tolls and thus be a burden upon interstate commerce, was too remote and incidental to make it a tax upon the business transacted."

And, after citing *Adams Express Co.* v. *Ohio State Auditor,* 166 U. S. 185, the court said further:

"The suggestion that such a tax on the cattle constitutes a tax on the lands * * * is purely fanciful."

In further answering the contention that such a tax was an invasion of the right of Congress to deal with the Indians, the court said:

"The unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they kept up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a state or territory, of property of others than Indians would be an interference with congressional power. It was decided in *Utah & Northern Railway Co.* v. *Fisher,* 116 U. S. 28 (29, 542), that the lands and railroad of a railway company within the limits of the

Fort Hill Indian Reservation in the Territory of Idaho was lawfully subject to territorial taxation, which might be enforced within the exterior boundaries of the reservation by proper process. The question was similarly decided in *Maricopa & P. Railroad Co.* v. *Arizona Territory,* 156 U. S. 347 (39, 447).

"The taxes in question here were not imposed on the business of grazing or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so it is too remote and indirect to be regarded as an interference with the legislative power of Congress.

"These views sufficiently dispose of the objections urged against the power of the Legislative Assembly of Oklahoma to pass laws taxing property within the limits of the Indian reservations and belonging to persons not Indians."

Also, in *Wagoner* v. *Evans,* 170 U. S. 588, the same questions were raised and the same decision rendered, upon authority of *Thomas* v. *Gay, supra.*

In *Montana Catholic Mission* v. *Missoula County,* 200 U. S. 118, the exact questions were presented that were presented in *Thomas* v. *Gay* and *Wagoner* v. *Evans, supra,* namely, the right to tax cattle grazed upon an Indian reservation under Federal permission. Mr. Justice Peckham, who delivered the opinion, said:

"This court has heretofore determined that the Indians' interest in this kind of property situated on their reservation was not sufficient to exempt such

property, when owned by private individuals, from taxation" (citing *Thomas* v. *Gay*, and *Wagoner* v. *Evans, supra*), and repeating the following:

> "This court held that the tax put upon the cattle of the lessees was too remote and indirect to be deemed a tax upon the lands or privileges of the Indians."

The court further said:

> "The government may lease a building from a private owner for the purpose of better carrying on its governmental duties and yet the building is not such an instrumentality as prevents its taxation by state authority."

In *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, the United States had let a contract for dredging the harbor of San Juan, Porto Rico, a reservation of the United States being dredged for the benefit of the United States. The insular government sought to levy a property tax upon the boats, tugs and machinery used in dredging the harbor. The company sought to enjoin the collection of the tax upon the ground that such a tax was a burden upon the interference with the operation of a Federal agency. The company contended also that the property had no taxable situs in Porto Rico. In answering these questions the court, through Mr. Justice McKenna, said:

> "If Porto Rico had jurisdiction over the harbor area, it had jurisdiction to tax property which was situated in the harbor, no matter how engaged; and, being so situated, the validity of the tax upon it cannot be determined by an inquiry of the extent it may

be benefited" (citing *Thomas* v. *Gay,* and *Wagoner* v. *Evans, supra*).

The tax was sustained and the decree of the district court enjoining the collection of such tax was reversed, with directions to sustain the demurrer and dismiss the bill.

And, in *Choctaw, etc., R. C.* v. *Harrison, supra,* the court reiterated and still adhered to the same doctrine, namely, that a tax upon "* * * the coal at the pit's mouth is permissible according to many opinions of this court" (citing *Thomas* v. *Union P. R. Co., supra*; *Union P. R. Co.* v. *Peniston, supra*; *Central P. R. Co.* v. *California, supra*; *Thomas* v. *Gay, supra*).

Also, in *Kansas Natural Gas Co.* v. *Haskell,* 172 Fed. 545, on the question as to whether the lessees' share of the oil and gas after it had been extracted from the earth and separated from the royalties was then the private personal property of the companies and subject to its exclusive control, the Federal court said:

> "On the contrary, it must be held, he who by lawful right reduces to his possession mineral, gas, or oil has the same absolute right of property therein, with the same power of barter, sale or other disposition, including, of necessity, the right of transportation and delivery under such reasonable rules and safeguards as the exigencies of the case may demand and the state employ, as the farmer has of his corn, his wheat, or his stock, or the merchant of his wares, and such absolute right therein as the state cannot deny him. * * *"

Upon appeal by the state to the Supreme Court of the United States (*Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217-8), the court, through Mr. Justice Day, approved the above language of the United States District Court by affirming the decree. The sole theory upon which the above conclusion is based and on which its soundness must rest is that when oil, gas and ores are extracted from the earth, and separated from the royalties due the Indians, they then become so absolutely and exclusively the private property of the lessee that the state has no more power to prevent their sale and shipment than it has to prevent the sale and shipment of the farmer's corn, his wheat, and his stock, or the sale and shipment of the merchant's wares, and the very truth of the proposition refutes every argument against their bearing the same rate of taxes that the farmer's products and the merchant's wares must bear.

Also, in *Shaffer* v. *Carter*, 252 U. S. 37, decided March 1, 1920, the court said:

> "The Oklahoma gross production tax, imposed on oil and gas producing companies, was intended as a substitute for the ad valorem property tax, and payment of it does not relieve the producer from taxation under the state income tax law."

Hence, the Supreme Court has expressly said what kind of a tax the Oklahoma "gross production tax" is.

As was said in *In re Skelton Lead & Zinc Co.'s Gross Production Tax 1919, supra*:

"In the case of *United States Express Co.* v. *Minnesota*, 223 U. S. 335, *supra*, every principle of law was decided that is presented in the case at bar. The statute under consideration there, which levied what is denominated a 'gross receipts tax', was identical in every essential feature with the statute under consideration here. The question was first before the Supreme Court of Minnesota, 114 Minn. 346, wherein the court held:

" 'The state has a right to impose a tax upon property within its borders regardless of the fact that such property may be employed by its owners in interstate commerce.

" 'The gross earnings tax provided by R. L. 1905, Sections 1013-1019, is not a tax upon the earnings of express companies, or upon the companies, or their right to engage in business, but is a tax upon their property within the state.

" 'A tax upon the property within the state of an express company engaged in interstate commerce, based upon its gross earnings within the state or interstate shipments, is not a regulation of or interference with interstate commerce.'

"There being an appeal from the above decision of the Supreme Court of Minnesota to the Supreme Court of the United States, upon review of the judgment of the Minnesota court, the Supreme Court of the United States said:

" 'We find no error in the judgment of the Supreme Court of the State of Minnesota, and it is affirmed.'

"An analysis and comparison of the provisions of the Minnesota statute with the provisions of the Okla-

homa statute will serve to accentuate the identity of principles involved.

"In the Minnesota statute the tax is denominated 'a gross production tax'. The Minnesota statute requires that express companies make reports to the State Auditor, showing: The name of the company, the nature of the company, the location of its principal office, the names and addresses of its managing agents in the state, the entire receipts, including all sums and charges, whether actually received or not, from business done in the state, the amount paid by such express company to railroads within the state for carrying its freight within the state, the entire receipts of the company for business done within the state, after deducting the amount paid to railroads for carrying its freight. The Oklahoma statute requires each party engaged in mining within the state to make certain reports showing: The location of the well or mine, the kind of mineral produced, the gross amount thereof, the actual cash value thereof at the place of production, the amount of royalty payable thereon and whether such royalty is exempt by any law, state or Federal, the facts on which said exemption is claimed.

"The Minnesota statute provides that, in case of failure or refusal of any express company to make the reports required by the law, 'the State Auditor shall inform himself as best he may', and may require the officers of said company to be brought before him with their books and records for his inspection, in order that he may inform himself fully as to the true amount of 'gross receipts', and provides, further, that the failure or refusal to attend and bring the books and records shall constitute a gross misdemeanor punishable by fine and imprisonment. The Oklahoma statute provides that, in case of failure or refusal of any mining company to make the reports required by law, the State Auditor shall have the power to require

such company to furnish such additional information as he may deem necessary, and may require the attendance of witnesses and the furnishing of books and records for his inspection, in order that he may fully inform himself as to the amount and true value of the 'gross products'; and provides, further, that a failure or refusal to attend before him and produce the books and records of the company shall be certified to the district court, wherein the offender shall be dealt with as in contempt cases.

"The Minnesota statute provides that the State Auditor, having ascertained the true amount thereof, shall assess a tax of 6 per cent upon the 'gross receipts'. The Oklahoma statute provides that the State Auditor, having ascertained the true value thereof, shall collect a tax of 3 per cent on the 'gross products'.

"The Minnesota statute levies the tax upon the 'gross receipts' from business done between points within the state. The Oklahoma statute levies the tax upon the 'gross products' obtained from mines operated within the state.

"The Minnesota statute levies the tax 'in lieu of all taxes upon its property' (express company's property). The Oklahoma statute levies the tax 'in full and in lieu of all taxes upon its property' (mining company's property). The Minnesota statute provides that the taxes, when collected, should be credited to the general revenue fund. The Oklahoma statute provides that when the gross production tax is collected, it should be credited to certain funds.

"The Minnesota statute provides a penalty for non-payment of such taxes, within 60 days after demand, of 10 per cent thereof at the time and____per cent a month for each subsequent month until the tax is paid. The Oklahoma statute provides for a penalty for non-payment of such taxes when due of 18 per cent per annum.

"The Minnesota statute provides that the State Treasurer is authorized to distrain enough of the personal property of said defaulting express company to satisfy the taxes and penalty, and to sell such property for the taxes if the tax is not paid before the day of sale. The Oklahoma statute provides that the State Auditor is required to direct that a sufficient amount of the mining company be sold upon execution to satisfy the taxes and penalties due.

"The purpose of both statutes is the same, and the same result is obtained in each. There is not a thing required to be done, not a step required to be taken under the Oklahoma statute that was not required under the Minnesota statute. There is not a legal principle involved in any step required to be taken under the Oklahoma statute that was not involved in a similar step required under the Minnesota statute, except that the Oklahoma statute is by far the less rigid of the two."

The case of *Choctaw, Oklahoma & Gulf Railway Co.* v. *Harrison, supra,* has been relied upon by defendants in error as opposing the imposition of the tax in question. An examination of that case discloses that the state was enjoined from collecting taxes "upon the gross sale of coals dug from mines belonging to the Choctaw and Chickasaw Indians, which it leased and operated"; said lands being a large area of segregated and unallotted lands. It is evident, therefore, that the property there held to be non-taxable is not situated as is the property here in question. As shown above, the property here sought to be taxed is produced from land purchased with restricted funds for an In-

dian and is not produced from unallotted and segregated lands belonging to a tribe of Indians.

The case of *Large Oil Company* v. *Howard*, 248 U. S. 549, 63 L. ed. 416, has been relied upon as opposing the contentions of the State. In that case, however, the tax was sought to be imposed upon the production of oil and gas from tribal land of the Osage Nation of Indians in Oklahoma Territory. The lease under which the property in question, under the case of *Large Oil Company* v. *Howard*, *supra*, was upon the tribal land of the Osage Nation, and the principle adopted there would obviously be inapplicable to the oil produced from lands purchased with restricted funds for an Indian.

In the case of *Howard* v. *Gypsy Oil Company*, 62 L. ed. 1239, the property in question was produced from leases of the same character as those dealt with in *Choctaw, Oklahoma & Gulf Railway Co.* v. *Harrison*, *supra*.

In *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522, 60 L. ed. 779, relied upon by defendants in error, the State sought to impose a corporation license tax upon the property of the corporation, including an oil and gas lease of Osage lands, under which lease the corporation was required to furnish gas free to the Osage citizens for use in the public institutions of the Osage under certain conditions named. It appears that the lease

under which the company there operated was made by the Osage tribe of Indians and conferred the privilege of prospecting, drilling wells and mining and producing petroleum and natural gas upon Osage Indian lands in Oklahoma Territory. The situation in that case was different from the situation in the case at bar, for the reason that the property there sought to be taxed was derived from lands belonging to the Osage tribe of Indians, and which lands had not theretofore been taxable by the State of Oklahoma. In fact, in all the above cases relied upon by the defendants in error, the land from which the oil in question was there produced had always been non-taxable by the State of Oklahoma. In the case now before this court the land from which the oil in question is produced was, prior to its purchase for Miller Tiger, the property of a non-Indian citizen of the State of Oklahoma, and subject to local taxation.

It is difficult to see why the Secretary of the Interior in purchasing these lands for the Indian allottee exercises any more of a governmental function than is that exercised by a trustee in bankruptcy in taking title to property of the bankrupt for the benefit of creditors (see Section 7, Act of Bankruptcy). The secretary, a Federal agent, invests the funds in property theretofore taxable, taking title in the name of the Indian; a trustee in bankruptcy, likewise a Federal agent, takes title to property, theretofore taxable,

for the benefit of creditors. But does the fact that he is a Federal agent, acquiring title for a purpose defined by Federal law, withdraw such property from taxation? The question arose in this court as to whether or not by reason of his character as a Federal agent the funds in the hands of a trustee in bankruptcy were exempt from state taxation. The Act of Bankruptcy nowhere specifically provides for such exemption, just as the Act of May 27, 1908, nowhere specifically provides that property in which the royalties accruing from a restricted lease may be invested shall be exempt from taxation. But it was urged in that case, just as it is urged here, that the trustee, being a Federal agent, taking title to the property, the same could not be taxed by the state, and this court replied thereto as follows:

> "The money was clearly liable to be taxed under the state law, and the tax is valid and collectible unless the Bankrupt Act exempts it from taxation. Exemption from taxation is never presumed. The legislative intent to exempt property from taxation must be clearly and explicitly expressed. Whether Congress could rightfully exempt from state taxation the property of a bankrupt in the hands of a trustee in bankruptcy, and otherwise subject to taxation, we need not inquire. It has not attempted to do so, and it is highly probable it never will. The power of taxation, as well as the power to exempt from taxation, is a legislative and not a judicial function; and a bankruptcy court no more than any other court can exempt from taxation property in the hands of one of its officers which is liable to taxation under the state law. It has never been

questioned but what property in the custody and control of receivers and trustees of Federal courts was subject to taxation under the state law, the same as other like property. Judson on Taxation, Section 407. and cases cited. And this applies to trustees in bankruptcy as well as receivers and trustees in other cases, and proceedings in the Federal courts. It is a grave mistake to suppose that property in the possession and custody of an officer of the Federal court by that single fact enjoys immunity from taxation. So far from exempting property in the custody and possession of its officers from taxation, a Federal court upon proper application will always order and direct the payment of the taxes duly assessed on such property, and treat the same as a preferred claim against the estate or fund. Judson on Taxation, Section 541."

Schwartz v. *Hammer,* 120 Fed. 256.

This case was appealed to the Supreme Court of the United States, and there the same conclusion was arrived at. That court in its opinion said:

"The question is not the extent of the power of Congress over the subject of bankruptcy, but what Congress intended by the Act of 1898. By Section 7 of that act the title to all of the property of the bankrupt, not declared to be exempt, is vested in the trustee. By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the state and municipalities or which should exempt it from its obligations to either. If Congress has the power to declare otherwise and wished to do so, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in ad-

ministering the estate of the bankrupt. Though the opinion of the Circuit Court of Appeals is brief, it is difficult to add anything to its conclusiveness."

194 U. S. 441, 48 L. ed. 1060.

Upon the question of the exemption of property taken over by a receiver of the Federal court, the Circuit Court of Appeals for the Ninth Circuit, in *McCoy* v. *Title Guaranty & Trust Co. et al.*, 220 Fed. 90, L. R. A. 1915E 211-217, said:

"It is too clear for argument that the appointment of a receiver and the taking of property into the hands of the court through its officer do not withdraw it from taxation. It remains subject to assessment and to the payment of all legal taxes thereon while in *custodia legis* to the same extent as it was while in the possession of the owner. And whether or not such taxes be a lien or debt by the laws of the government within whose jurisdiction the property is situated, such taxes are and should be regarded by the courts as a preferred and paramount claim over all other claims, for they are essential to the existence and maintenance of the very government under which the property is acquired and protected."

In *United States* v. *McCurdy, supra,* it was said:

"It is education through the responsibility for spending, *not the property purchased with released funds,* which constitutes the instrumentality employed by the government in fitting the individual Osage Indian to take his full part as a citizen of the United States."

So, in this case, it was education through the responsibility for spending, not the property purchased for Miller

Tiger with released funds, which constituted the Federal instrumentality. Certainly the operation under an oil lease by the defendants in error constitutes no part of the education of Miller Tiger. The only claim which defendants in error can make to an exemption from taxation is that they are producing oil under a lease on property purchased with restricted funds.

In *United States* v. *Gray, supra,* it was contended that the taxation of land purchased with restricted funds constituted the taxation of a Federal instrumentality. This contention was very briefly disposed of by the United States Circuit Court of Appeals.

In *United States* v. *Ransom, supra,* it was contended that to tax the property purchased with restricted funds constituted the taxing of an instrumentality. The contention there made was by this court denied.

In *United States* v. *Brown, supra,* the Circuit Court of Appeals for the Eighth Circuit held that the land of Miller Tiger from which the oil in this case is produced is subject to state taxation, and it is difficult to see how it could be consistently held that the taxing of Miller Tiger's land is not the taxing of a Federal instrumentality, and then to hold that the taxing of the oil produced from the land is the taxing of a Federal instrumentality because so produced. Then again, even if the land of Miller Tiger might

not be taxable by the State against the Indian, we believe it does not necessarily follow that the oil company in this case would be entitled to be relieved from taxation on oil produced from said land. This conclusion becomes apparent from the language used by Mr. Justice Stone in the case of *Lewellyn* v. *Colonial Trust Company*, 72 L. ed. 19, where the court was considering the power of the Federal government to impose its income tax upon the income derived by the lessee from a restricted Indian on oil produced from such restricted land. In said case the court sustained the power of the government to impose its income tax on the income of the oil company derived from said Indian lease. It was there urged that the government could not impose such taxes upon the income of the Indian himself. In answering this contention the court said:

> "Assuming that the Indians are not subject to the income tax, as contended, the fact that they are wards of the government is not a persuasive reason for inferring a purpose to exempt from taxation the income of others derived from their dealing with the Indians. Tax exemptions are never lightly to be inferred (*Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665, 668, 29 L. ed. 770, 771, 6 Sup. Ct. Rep. 625; *Philadelphia, W. & B. R. Co.* v. *Maryland*, 10 How. 376, 393, 13 L. ed. 461, 468), and we think any implication of an exemption of the income of the Indians themselves, if made, must rest on too narrow a basis to justify the inclusion of the income of other persons merely because the statute, if applied as written, may have some perceptible economic effect on the Indians."

Consequently, even if the State were without power to tax the land of Miller Tiger, it would not necessarily follow that it was forbidden to tax the property of this company because such taxation might have some perceptible economic effect on the Indian. However, as pointed out above, the power of the State to tax the land of the Indian has been sustained by this court and we certainly believe that this court will not extend to this oil company, because it dealt with an Indian, exemption from taxation, when such exemption is denied to the Indian himself.

Furthermore, the record in this case discloses that the United States government is not here asserting that the State of Oklahoma is taxing a Federal instrumentality in levying the tax in question. That claim is made only by this private corporation, organized for profit, and having many private functions to perform, aside from any incidental connection with a departmental lease. The government does not even assert that the State infringes upon this instrumentality when it taxes the land of Miller Tiger, its Indian ward, but, on the other hand, voluntarily pays the taxes levied by the State on the land of its ward. Denying the right to Miller Tiger to have his land exempt from taxation, we believe this court will also consistently deny to this company the right to have its oil exempt from state taxation, solely because the same is produced from Miller Tiger's land.

Another consideration is before this court in this case. As we have heretofore shown, the question of supremacy of power between the Federal government and the State of Oklahoma, as was said in *Sunderland* v. *United States, supra,* must be determined in this case.

May Congress empower the secretary in investing restricted funds in lands theretofore taxable by the State to so clothe the land with the character of a Federal instrumentality as to withdraw it from that class of property upon which the State's right of taxation operates?

It will be observed that there is no other class of Federal agencies which is analogous to that claimed for land so purchased in this cause. We know of no instance where land has been clothed with the character of an instrumentality for the carrying out of governmental powers of the United States, except in cases where the government has itself acquired the title to the land for use, such as for forts, arsenals, post offices, etc. There is a clear distinction between the acquisition of title by the government for such purposes and the acquisition of title for a restricted Indian for the purpose of speculation—for such could be the only purpose for which these lands were purchased for Miller Tiger. (It, could not be said that they were purchased for the purpose of conserving the funds withheld from him arising from royalties, for such funds could not

possibly be more safely kept than in the treasury of the United States. The only purpose for such investment, therefore, must have been for the purpose of increasing the fund through speculation or through returns in rents from the lands.)

There is another distinction between the acquisition of title by the government for its purposes and acquisition of title for the Indian in cases like those involved in this cause. In cases where the government acquires title to the land, it is to fulfill a governmental purpose which could not be performed except by the acquisition of title to land. The governmental function, however, of preserving these monies for Miller Tiger could have been as readily exercised by the withholding of these moneys in the treasury of the United States, or, if investment were necessary, by investment in securities already non-taxable. It was not necessary, in other words, in order to fulfill its obligation toward this ward, for the government to invest the funds in theretofore taxable land.

Just as the right to tax must be measured by the extent to which it could be carried, rather than the extent to which it probably would be carried, as was held in the McCulloch case, so the right to exempt by one sovereignty having a right to tax concurrent with that of another sovereignty, it seems to us, should be measured by the same

rule. The necessary conflict between the right of the State to collect revenue for state purposes, and the right of the Federal government to exempt for its purposes, requires that the right of exemption be recognized only in those cases where the subject matter thereof is *necessarily* laid hold of by the Federal government for the exercise of a governmental function. It is clear that lands to which the government acquires title for the exercise of its governmental functions is non-taxable by the State, even though theretofore it had been taxable and though the State had not consented to the acquisition of title thereto by the Federal government. But the power thus residing in the Federal government to withdraw land from taxation for such purpose is necessarily limited; because, as was pointed out by the Supreme Court of the United States in the case of *Van Brockin* v. *Anderson*, 117 U. S. 151, 29 Law ed. 845:

> "The United States do not and cannot hold property as a monarch may for private or personal purposes. All the property and revenues of the United States must be held and applied as all taxes, duties, imposts and assizes, must be laid and collected 'to pay the debts and provide for the common defense and general welfare of the United States.' "

The extent, however, to which taxable real estate might be withdrawn from taxation by the State, were it held that the secretary could invest these royalties therein, thus exempting the same from taxation, would be measured only by the amount of royalties so produced, and we assert that

what this limitation may be, no man can tell. It is certain that that amount has steadily increased each year since oil was first produced upon the lands of the Five Civilized Tribes, and continues to increase.

The same principle, it seems to us, should be applicable here as was applied by the Supreme Court of the United States in the case of *South Carolina* v. *United States*, 199 U. S. 437, 50 Law ed. 261. In that case the question arose as to whether the United States might, under the Federal Constitution, exact the license taxes prescribed by the internal revenue laws for dealers in intoxicating liquors from the dispensary agents of the State of South Carolina, which in the exercise of its sovereign power had taken charge of the business of selling such liquors in that state.

The last paragraph of the syllabus in said case is as follows:

> "The exemption of state agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those used by the state in carrying on an ordinary private business."

In discussing the question, Mr. Justice Brewer, for the court, said:

> "Among those matters which are implied, though not expressed, is that the nation may not, in the exercise of its powers, prevent a state from discharging the ordinary functions of government, just as it fol-

lows from the second clause of Article 6 of the Constitution, that no state can interfere with the free and unembarrassed exercise by the national government of all the powers conferred upon it.

* * * * * * * * *

"The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million dollars. Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one state finds it thus profitable, other states may follow, and the whole body of internal revenue tax be thus stricken down.

"We may go a step further. There are some insisting that the state shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any state, how much would that state contribute to the revenue of the nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a state assumes, under its police power, the control of all those matters subject to the internal revenue tax, and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a state of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a state from import duty. While the state might not prohibit importations, as it can the sale of liquor, by private individuals, yet, paying no import duty, it could undersell

all individuals, and so monopolize the importation and sale of foreign goods.

"Obviously, if the power of the state is carried to the extent suggested, and with it is relief from all Federal taxation, the national government would be largely crippled in its revenues. Indeed, if all the states should concur in exercising their powers to the full extent, it would be almost impossible for the nation to collect any revenues. In other words, in this indirect way it would be within the competency of the state to practically destroy the efficiency of the national government."

Further on in the opinion it is said:

"There is something of a conflict between the full power of the nation in respect to taxation and the exemption of the state from Federal taxation in respect to its property and a discharge of all its functions. Where and how shall the line between them be drawn? We have seen that the full power of collecting license taxes is in terms granted to the national government, with only the limitations of uniformity and the public benefit. The exemption of the state's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the state in all its efficiency. In order to determine to what extent that implication will go, we must turn to the condition of things at the time the Constitution was framed. What, in the light of that condition, did the framers of the Constitution intend should be exempt. Certain it is that modern notions as to the extent to which the functions of a state may be carried had then no hold.

* * * * * * * * *

"Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers, in granting full

power over license taxes to the national government meant that that power should be complete, and never thought that the states, by extending their functions, could practically destroy it."

We submit that the reverse of the case there considered should equally hold good, that is, that the conflict which necessarily exists between the right of the Federal government to tax and the right of the State to exempt likewise exists between the right of the State to tax and the right of the Federal government to exempt; that in the same manner that it was never contemplated by the framers of the Constitution that the State, by extending functions to engaging in various monopolistic enterprises, could defeat the right of the government to collect its revenues, so it was never contemplated by the framers of the Constitution that the Indian tribes would ever acquire the enormous wealth which the members of the Five Civilized Tribes have fallen heir to, and it could not have been contemplated by the framers of that instrument that by the use of such wealth the Federal government could withdraw from the states their right of taxation over lands. In the case last cited it is indicated that the principle governing such cases should be that the exemption of state agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character and does not extend to those which are used by the state in the carrying on of an ordinarily private business.

In investing these royalties of restricted Indians in land, the government of the United States exercises, it seems to us, no governmental function. The use of the land was not necessary for the performance of any of the government's obligations. It must be deemed purely a speculative enterprise for the benefit of the Indian. The national government was under no obligation to increase the wealth of the Indian, but merely to conserve the fund and to pay it over to him at such time as was best for him. As was said in the McCurdy case:

> "It is education through the responsibility for spending, not the property purchased with released money, which constitutes the instrumentality employed by the government in fitting the individual Osage Indian to take his full part as a citizen of the United States."

That, it seems to us, was the governmental function to be exercised—the fitting of the Indian for his full part as a citizen of the United States. It cannot reasonably be said that the purchase of this land was reasonably necessary for this purpose. It must, therefore, be deemed a private enterprise for increasing the wealth of the Indian, and it seems to us it should be held to fall in that class of governmental activities which is similar to the private enterprises in which a state engages. If this be true, then Congress could not authorize the exemption of land so held, thus defeating the state's right to collect its revenue therefrom.

CASES HERETOFORE CITED BY DEFENDANT IN ERROR.

It has heretofore been contended by defendants in error that the rules heretofore announced by this court and the Circuit Court of Appeals in *United States* v. *McCurdy, supra; United States* v. *Gray, supra; United States* v. *Ransom, supra; United States* v. *Brown, supra;* and *United States* v. *Mummert, supra,* are unsound in holding that the Federal government cannot withdraw lands theretofore taxable by the State from state taxation. In each of the cases cited we believe we can show the distinction lies in the fact that in those cases title to the land was in the United States government, and the language used in *United States* v. *McCurdy, supra,* serves to distinguish the cases here relied upon. There the court said:

> "It is consistent with the facts shown that the restriction upon alienation, inserted in the deed, was not a continuation of control reserved by the Secretary of the Interior, but a bringing under his control of a part of Panther's estate theretofore freed. In this respect and others the present case differs from *United States* v. *Thurston County,* 74 C. C. A. 425, 143 Fed. 287, much relied upon by the government. There is also a clear distinction between the present case and those like *United States* v. *Rickert,* 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478, where it was sought to tax property, the legal title of which was in the United States, and which was held by it for the benefit of Indians."

In *McCullough* v. *Maryland,* 4 Wheat. 316, relied upon

by defendants in error, the inability of a state to tax an instrumentality of the Federal government was established. However, in said case Chief Justice Marshall said:

> "This opinion does not deprive the states of any reservations which they originally possessed. It does not extend to a tax paid upon the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the state."

In *Van Brocklin* v. *Tennessee*, 117 U. S. 151, relied upon by defendant in error, the land there held to be not taxable was acquired by the United States for taxes levied by the United States, and at the time the authorities of Tennessee sought to tax said property it was owned by the United States government itself. The whole opinion is based upon the fact that the United States owned the land, as is shown by the following language from said case:

> "All the assessments were unlawful because made while the land was owned by the United States."

Nowhere in the opinion is there any intimation that the land was ever subject to state taxation, and the power of the Federal government to withdraw theretofore taxable land from state taxation was not considered or involved.

In *United States* v. *Bean*, 253 Fed. 1, the lands sought to be taxed by the State of Oklahoma were allotments of

the Seminole Indians, formerly owned by the Seminole Nation or Tribe of Indians. Hence the lands in question had never been subject to state taxation, and the power of the Federal government to withdraw theretofore taxable land from state taxation was not considered. The court said:

> "The Seminole agreement did not say that surplus land should be exempt from taxation, but when the agreement was made they were free from taxation."

In *United States* v. *Pearson*, 231 Fed. 270, relied upon by defendant in error, all the property sought to be taxed was received either directly or indirectly by the Indians from the government and was used by the Indians on allotments, the legal title to which was in the government and not in the Indians. The personalty tax consisted of issued property and its increase and property for which the issued property and its increase had been traded and property bought with money given the Indians by the government. It was admitted that title to the property so issued by the government was retained by the United States; also, the South Dakota Enabling Act gave Congress exclusive control over Indians, who had not severed tribal relations, which had not been done in said case. There is no intimation in said case that such property was ever taxable by the State, and the question of the power of the government to withdraw from state taxation property theretofore taxable was not considered.

In *United States* v. *Rickert*, 188 U. S. 433, relied upon

by defendant in error, South Dakota sought to tax improvements made on restricted Indian lands, and, also, personal property consisting of cattle, horses, *et cetera,* of the Indians. There the allotment was held in trust for twenty-five years by the government when the deed was made to the Indians. The United States retained legal title, giving the Indian allottee a paper or writing that the fee would be conveyed to him at the end of said period; also, the Constitution of South Dakota expressly exempted Indian land where it was held by the United States. This court held that the permanent improvements on said land were part of the land, that the personal property was purchased with money of the government, and the court said it was in effect the property of the government for the use of the Indians. There is no intimation in said case that any of the property taxed had ever been taxable, and it was held exempt from taxation because owned by the Federal government.

In *Clallam County* v. *United States,* 263 U. S. 341, 68 L. ed. 339, an attempt was made to tax property belonging to the United States Spruce Production Corporation, consisting of land and sawmills, *et cetera.* In said case it was pointed out that the United States owned all the stock of said corporation, and that the legal title only to the property in question was in the corporation; also, said corporation was formed and used wholly to prosecute the war. All the bonds issued by said company were bought by the United States. The court there said:

"This is not like the case of a corporation having its own purposes as well as those of the United States, and interested in profit on its own account."

There is no intimation in the case as to whether such property was ever taxable by the state, and the power of the Federal government to withdraw theretofore taxable property from taxation was not involved or considered.

In *King County* v. *United States Shipping Board Emergency Fleet Corporation,* 282 Fed. 950, relied upon by the defendant in error, said corporation held only the legal title to the property, but the entire beneficial interest in said property was in the government. The government caused the corporation to be formed, held all of its stock and furnished all of its capital, supplied the funds with which the property in question was purchased, said funds being especially appropriated by Congress for such purposes. This whole case is decided upon the theory that the government owned the beneficial interest in the property, and the power of the government to withdraw theretofore taxable property from state taxation was not involved or considered.

In *United States Spruce Production Corporation* v. *Lincoln County,* 285 Federal 388, the property there sought to be taxed was purchased with money appropriated by Congress to carry on the war. Only the nominal title to said property was in the corporation, the whole beneficial interest being in the government. Said corporation was employed exclusively in government work, and had no purposes of its own in

which it was interested in profit on its own account. There is no intimation in the opinion that the property sought to be taxed had ever been subject to state taxation, and the question of the power of the government to withdraw theretofore taxable property from state taxation was not involved or considered.

We submit, therefore, that the State of Oklahoma, in taxing the property of this company, does not constitute the taxing of a Federal instrumentality in violation of the Constitution of the United States. Since no exemption from taxation exists by implication and since Congress in the Act of May 27, 1908, has not sought to exempt from taxation the property of the defendants in error, and has not attempted to confer power upon the Secretary of the Interior to exempt said property, and since the secretary has not attempted to exempt said property from state taxation, and since the United States government does not assert that its instrumentality would be hampered by the imposition of the taxes in question upon the property of the defendants in error, we respectfully submit that no such exemption exists, and that, therefore, both of the certified questions should be answered in the negative.

Respectfully submitted,

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V. P. CROWE,
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Attorneys for Plaintiff in Error.

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Supreme Court of the United States

October Term, 1927.

A. S. J. SHAW, STATE AUDITOR, Substituted for C. C. CHILDERS, STATE AUDITOR, OF THE STATE OF OKLAHOMA,
Plaintiff in Error,

vs.

GIBSON-ZAHNISER OIL CORPORATION ET AL.,
Defendants in Error.

No. 234

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT.

Miller Tiger, a full blood Creek Indian, received his allotment, which has at all times been subject to Federal restrictions. The Act of May 27, 1908, 35 Stat. 312, Section 2, provided how such restricted land might be leased for oil and gas, as follows:

> "That leases of restricted lands for oil and gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for a period of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

Pursuant to the authority given to the Secretary of the Interior by said Act of Congress, the Secretary of the Interior promulgated certain rules and regulations covering the leasing of restricted Indian lands for oil and gas purposes, and the disposition of the royalties, rents or payments accruing under such leases. Said rules and regulations provide as follows:

> "All royalties, rents or payments accruing under any lease made for or on behalf of any minor or incompetent shall be held by the Superintendent for the Five Civilized Tribes or such other officer as may be designated by the Secretary of the Interior, to the credit of the guardian (or curator) of such minor or incompetent, and shall be paid to such guardian (or curator) upon voucher, executed by him and approved by the county (probate) court having jurisdiction of the estate of such minor or incompetent (the form of such voucher to be prescribed by the department), or upon authority of such court in the form of an order satisfactory to such superintendent or other officer in charge of the office of the Superintendent to the Five Civilized Tribes.
>
> "Provided, however, that the said superintendent or other officer in charge of the office of the Superintendent to the Civilized Tribes is authorized in his discretion, where considered for the best interests of any adult, minor or incompetent lessor, or his or her heirs, for whose account royalties, rents or payment accruing under any lease have been paid to said superintendent, to withhold disbursement of such royalties, rents or payments, wholly or in part, from any such adult, guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor or his or her heirs."

The Secretary of the Interior also promulgated Rule 20, which is as follows:

> "In any case where lands are purchased for the use and benefit of any citizen of the Five Civilized Tribes of the restricted class, payment for which is made from proceeds arising from the sale of restricted allotted land, or other monies held under the control of the Department of Interior, the Superintendent of the Five Civilized Tribes shall cause conveyance of such lands to be made on form of conveyance containing an *habendum* clause against alienation or incumbrance until April 26, 1931, as follows: 'To have and to hold said described premises unto the said grantee * * * heirs and assigns, forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages and other liens and incumbrances of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described, or the title thereto, executed during the lifetime of said grantees, at any time prior to April 26, 1931, shall be of any force and effect, or capable of confirmation or ratification, unless made by the consent of and with the approval of the Secretary of the Interior.' "

After the promulgation of said rules, and while the same were in full force and effect, and at a time when the allotment of Miller Tiger was restricted against alienation, Miller Tiger executed an oil and gas lease on his restricted homestead allotment, which lease was executed on the form prescribed by the Secretary of the Interior, and contained the following provisions:

"This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force rel-

ative to such leases, all of which are made a part and condition of this lease."

The form of lease so executed is commonly referred to as a departmental oil and gas lease. Oil was thereafter produced from said land under said lease, and the rents and royalties due to the lessor thereunder were paid to the Superintendent of the Five Civilized Tribes, in accordance with the above regulations, and held in trust for Miller Tiger under the above rule.

On July 26, 1915, Miller Tiger, through his guardians, requested authority of the County Court of Okmulgee County to invest the sum of three thousand dollars of the restricted royalties in one hundred sixty acres of agricultural land in Okfuskee County, Oklahoma, for a home for said ward, alleging that this investment would be for the best interests of the ward and for the estate. Upon hearing, the court authorized the purchase, upon condition that the vendor should execute to the Indian a good and sufficient warranty deed in accordance with the rules and regulations prescribed by the Department of the Interior. Pursuant to this arrangement the Superintendent of the Five Civilized Tribes purchased said land out of the restricted royalties in his hands, and a check was drawn by such Superintendent for the sum of three thousand dollars on the restricted funds of Miller Tiger and payable to the order of the guardians, and by them deposited in their general

guardianship account in the bank. On the same day, and as a part of the same transaction, the guardians drew their check against said account in favor of the vendor, and delivered it to him in payment of the purchase price of the land. In the meantime, on the 26th day of July, 1915, a special form of deed had been executed in accordance with the conditions exacted by the department and by the court, and in accordance with said Rule 20, and contained the following clause:

"To have and to hold said described premises unto the said grantee, his heirs and assigns, forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages and other liens and incumbrances, of whatsoever nature, subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described, or the title thereto, executed during the life of said grantee at any time prior to April 26. 1931, shall be of any force or effect or capable of confirmation or ratification, unless with the consent and approval of the Secretary of the Interior."

This deed was delivered simultaneously with the payment of the purchase price.

On February 10, 1919, Miller Tiger executed a departmental oil and gas lease on the land so purchased to G. L. Sandlin, and the same was duly approved by the Secretary of the Interior in accordance with the restrictions contained in the deed. This lease was thereafter assigned to E. L. Robinson and Gibson-Zahniser Oil Corporation, defendants in error herein. Operating under this depart-

mental lease, defendants in error have produced oil, upon which the State Auditor of Oklahoma has levied and assessed gross production taxes in the total sum of $20,923.01, which said taxes were paid to the State Auditor under protest, and this suit was instituted to recover the same.

Prior to the purchase of said land for Miller Tiger, the same was owned by a non-Indian citizen and was legally subject to state, county and municipal taxation while so owned.

Judgment was for the defendants in error in the trial court.

The plaintiff in error contends that the land so purchased for Miller Tiger, having been subject to the taxing power of the State at the time of its purchase, could not be withdrawn from state taxation, and that, also, the lessees under the departmental lease are not exempted from the payment of the gross production tax.

Defendants in error contend: First, that the Secretary of the Interior was authorized to and did impose restrictions against alienation on the land purchased for Miller Tiger; that said land thereby became a Federal instrumentality and continues as such during the period of restriction, and was exempt from taxation as such by the Constitution of the United States; that State taxation is inconsistent with restrictions imposed by the paramount

Federal law. Second, that even though the land is taxable, the gross production tax collected under the provisions of Section 9814, Compiled Oklahoma Statutes 1921, is a tax on a Federal instrumentality and therefore invalid.

ARGUMENT AND BRIEF.

Question One.

Had the Secretary of the Interior, on October 24, 1915, when this land was purchased, power to exempt from such state taxation land purchased under his supervision for a full blood Creek Indian with trust funds of that Indian, where the land so purchased was, at that time, subject to all state taxes?

A. The restrictions contained in the deed to Miller Tiger constitute valid Federal restrictions against the alienation of the land.

Counsel for plaintiff in error argue that the restriction against alienation contained in the deed to Miller Tiger was invalid and ineffective. This question is not open for controversy, as the validity of the restriction has been judicially determined. In December, 1921, Miller Tiger executed a deed to a portion of the said land. This deed was not approved by the Secretary of the Interior. Suit was filed by the United States to cancel this deed, and in an opinion by the Circuit Court for the Eighth Circuit, in *United States* v. *Brown*, 8 Fed. (2d) 564, the court held that the restriction was valid and binding, and that the land was not subject to alienation unless made with the consent

of, and approved by, the Secretary of the Interior. Certiorari was denied in *Brown* v. *United States,* 270 U. S. 644.

At page 15 of the brief of plaintiff in error it is stated that the agreed statement of facts shows that there was no direct investment by the Superintendent of the Five Civilized Tribes in the land purchased for Miller Tiger, and that the restricted funds were co-mingled with general guardianship funds and that the case therefore is brought within *McCurdy* v. *United States,* 264 U. S. 263. The circuit court did not certify to this court the agreed statement of facts, and did not fully state the facts relative to the purchase, doubtless because the validity of the restrictions had already been determined. The opinion of the circuit court in *United States* v. *Brown, supra,* fully answered the contention of appellant at pages 564-565, as follows:

> "It will be seen, therefore, that every act above described was part of one and the same transaction, which evidences the purpose to make the release of the funds conditioned upon and coincident with the retention of supervision. This was the purpose of the department, by which the controlling regulation was promulgated, and of the court, upon which, as a governmental agency, had been conferred jurisdiction of the subject matter."

The opinion in that case followed *Sunderland* v. *United States,* 266 U. S. 226, in which this court said:

> "So long as the Indians remain wards of the government, the interposition of the strong shield of the

Federal law is justified, to the end that they be not overreached or despoiled in respect of their property of whatsoever kind or nature. * * * If Congress, in fulfillment of its duty to protect the Indians, whose welfare is the peculiar concern of the Federal government, deems it proper to restrict for a limited time the right of the individual Indian to alienate land purchased for him with funds arising from the sale of other lands originally subject to a like restriction, we are not aware of anything which stands in the way. * * * Indeed, we think the authority of the secretary to withhold his consent to the proposed investment of the proceeds subject to his control, includes the lesser authority to allow the investment upon condition that the property into which the proceeds are converted shall be impressed with a like control."

This court also said:

"And again, in *United States* v. *Moore*, 284 Fed. 86, we held that, once the duty is laid upon the government to preserve the land intact, and as a part of it the profits to accrue from it, that duty must remain until performance, although postponed until the disability of the allottee was removed as to future dealing with the property. In *United States* v. *Hinkle*, 261 Fed. 518, this court has recognized that mineral rents and profits derived from restricted lands of full bloods are vested in the Secretary of the Interior as a trust fund, separate and distinct from the trust estate in the land itself under the act and regulations which had the force of law. It would follow, logically, that the Secretary may impress such funds with proper restrictions imposed simultaneously with the quasi release thereof."

In answering the two questions which have been certified to this court by the Circuit Court of Appeals, we must, therefore, concede that the land so purchased for Miller

Tiger is subject to valid Federal restriction against alienation; that it was subject to such restriction at the time the oil and gas lease was executed to G. L. Sandlin, and such lease was duly approved by the Secretary of the Interior in conformity with said restrictions.

B. This restricted land was and is an instrumentality of the Federal government in carrying out the duty which the United States owes to its Indian ward.

The restriction against alienation or incumbrance of this land, except by the consent and with the approval of the Secretary of the Interior, was imposed pursuant to the general protective policy of Congress in dealing with dependent Indians, and when this land was purchased with restricted Indian funds, and pursuant to the protective policy of the Federal government, the land so purchased was restricted against alienation or incumbrance, such land thereby became an instrumentality of the Federal government in discharging its duty to a dependent ward.

In *Sunderland* v. *United States*, 266 U. S. 226, at pages 233 and 234, the court said:

> "However that may be, we do not doubt the power of the United States to impose such a restraint upon the sale of the lands of its Indian wards, whether acquired by private purchase and generally subject to state control or not. Such power rests upon the dependent character of the Indians, their recognized inability to safely conduct business affairs, and the peculiar duty of the Federal government to safeguard their interests and protect them against the greed of others and their

own improvidence. See and compare *Libby* v. *Clark*, 118 U. S. 250, 255; *United States* v. *Paine Lumber Co.*, 206 U. S. 467, 473; *Blanset* v. *Cardin*, 256 U. S. 319, 326; *Bunch* v. *Cole*, 263 U. S. 250, 252; *Sperry Oil Co.* v. *Chisholm*, 264 U. S. 488, 493. And the power does not fall short of the need; but, so long as they remain wards of government, justifies the interposition of the strong shield of Federal law to the end that they be not overreached or despoiled in respect of their property of whatsoever kind or nature. *United States* v. *Kagama*, 118 U. S. 375, 383-4."

At pages 234 to 235 the court said:

"When the general protective policy of Congress in dealing with the Indians is borne in mind, it reasonably cannot be doubted that the authority conferred upon the Secretary to make rules concerning the 'disposal of the proceeds for the benefit of the respective Indians' is broad enough to justify the rule in question. Since the allotted lands could not be sold or encumbered without his consent, and since the proceeds of any sale thereof were subject to his control and could only be disposed of with his approval and under such rules as he might prescribe for the benefit of the respective Indians, the extension of such control to the property in which the proceeds were directly invested would seem to be within the statute fairly construed. Indeed, we think the authority of the Secretary to withhold his consent to the proposed investment of the proceeds subject to his control, includes the lesser authority to allow the investment upon condition that the property into which the proceeds are converted shall be impressed with a like control. See *United States* v. *Law*, 250 Fed. 218; *United States* v. *Thurston County*, 143 Fed. 287, 290-291; *National Bank of Commerce* v. *Anderson*, 147 Fed. 87, 90."

In *Childers* v. *Beaver*, 270 U. S. 555, at page 559, the court said:

> "It must be accepted as established that during the trust or restrictive period Congress has power to control lands within a state which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized thereon cannot be subjected to taxation by the state without assent of the Federal government. *The Kansas Indians*, 5 Wall. 737; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Choctaw, etc., R. R.* v. *Harrison*, 235 U. S. 292; *Hallowell* v. *Commons*, 239 U. S. 506; *Lane* v. *Mickadiet*, 241 U. S. 201; *Jefferson* v. *Fink*, 247 U. S. 288; *Blanset* v. *Cardin*, 256 U. S. 319; *United States* v. *Bowling*, 256 U. S. 484; *McCurdy* v. *United States*, 264 U. S. 484; *Sperry Oil Co.* v. *Chisholm*, 264 U. S. 488."

In *United States* v. *Bean* (8th Cir.), 253 Fed. 1, the court, at page 4, said:

> "Counsel call attention to the fact that there is no provision in the agreement with the Seminole Nation that any of the lands to be allotted to the members of the tribe, except the homesteads, should be free from taxation while they remained inalienable. But when that agreement was made they were free from taxation, and those who made the agreement knew that the settled policy and practice of the United States was to protect the members of the tribe and all the property which it held the control and disposition of for them free from taxation until it granted them full power of disposition thereof. And it was doubtless for that reason that no stipulation was inserted in the treaty on the subject, except that the 40 acres to be selected by

each member of the tribe for a homestead should be 'non-taxable as a homestead in perpetuity'. 30 Stat. 567, 568. So it was that the imposition of the restrictions upon alienation by these acts of 1906 and 1908 upon the lands of the full blood Indian heirs brought these lands under the universal rule that every instrumentality lawfully employed by the United States to execute its constitutional laws and to exercise its lawful governmental authority is necessarily exempt from the state taxation or interference. *United States* v. *Rickert*, 188 U. S. 432, 437, 438, 439, 23 Sup. Ct. 478, 47 L. ed. 532; *United States* v. *Thurston County*, 143 Fed. 287, 289, 290, 74 C. C. A. 425."

United States v. *Law*, 250 Fed. 218.
United States v. *Thurston County*, 143 Fed. 287.
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United States v. *Bowling*, 256 U. S. 484.

C. Without congressional consent no Federal agency or instrumentality can be taxed by a state.

McCulloch v. *Maryland*, 4 Wheat. 316.
Johnson v. *Maryland*, 254 U. S. 51.
Farmers Bank v. *Minn.*, 232 U. S. 516.
Choctaw G. R. R. Co. v. *Harrison*, 235 U. S. 292.
Indian Oil Co. v. *Oklahoma*, 240 U. S. 522.
Howard v. *Oil Companies*, 247 U. S. 503.
Large Oil Co. v. *Howard*, 248 U. S. 549.
Gillespie v. *Oklahoma*, 257 U. S. 501.
U. S. v. *Thurston County*, 143 Fed. 287.

Van Brocklin v. *Tennessee*, 117 U. S. 151.
U. S. v. *Pearson*, 231 Fed. 270.
U. S. v. *Rickert*, 188 Fed. 433.
Clallam County v. *U. S.*, 263 U. S. 341.
King County v. *United States Shipping Board Emergency Fleet Corp.*, 282 Fed. 950.
United States Spruce Pro. Corp. v. *Lincoln Co.*, 285 Fed. 388.
Childers v. *Beaver*, 270 U. S. 555.
United States v. *Bean* (8th Cir.), 253 Fed. 1.
Jaybird Mining Co. v. *Weir*, 271 U. S. 609.
Northwestern Mutual Life Insurance Co. v. *State of Wisconsin*, No. 75 and 76, October Term, 1927.

Counsel for the plaintiff in error proceed on the theory that the land of Miller Tiger cannot be exempted from state taxation without express authority from Congress. Reference is made to the Act of May 27, 1908, 35 Stat. 312, and attention is called to the fact that said act contains no express provision exempting from taxation royalties arising on restricted lands, or lands purchased with restricted funds. Reference is also made to Section 4 of the act, which provides:

> "That all lands from which restrictions have been or shall be removed shall be subject to taxation, and all other civil burdens, as though it were the property of other persons than allottees of the Five Civilized Tribes",

and attention is called to the report of the Committee on Indian Affairs which was submitted to Congress just prior to the enactment of the Act of May 27, 1908. There is noth-

ing in said act or the report of the committee indicating that Congress intended to consent to state taxation upon any lands upon which Federal restriction existed or might subsequently be imposed. Under the Act of April 26, 1904, Stat. 137, Section 19, all land allotted to members of the Five Civilized Tribes was exempt from state taxation as long as the title remained in the original allottee, and only such lands from which restrictions had been removed by the Secretary of the Interior was subject to taxation. The Act of 1908 removed restrictions from much of the Indian land which had previously been restricted, and it was the purpose of Section 4 of the act to permit all unrestricted lands to be taxed by the state, even though owned by the original allottees.

In *Choate* v. *Trapp*, 224 U. S. 665, this court held that the above act did not subject the unrestricted land to taxation during the period covered by the tax exemption contained in the patents.

An examination of the Act of May 27, 1908, shows, however, that there is no express exemption from state taxation of any lands or other property of the members of the Five Civilized Tribes contained in said act. The exemption from taxation is not based on any act of Congress, but such exemption is founded upon the fact that state taxation is inconsistent with restrictions upon alienation which Congress has imposed, and upon the fact that the state can-

not, without the consent of Congress, tax a Federal instrumentality. For example, let us consider lands inherited by full blood Indian heirs. Much of this land was free from Federal restrictions prior to the Act of 1906, but the restrictions were reimposed by that act and were continued in force under the provisions of Section 9 of the Act of May 27, 1908. Such lands have been held exempt from state taxation, not because there is any act of Congress exempting such lands from taxation, but for the reasons above stated.

United States v. *Bean,* 253 Fed. 1.
United States v. *Shock,* 187 Fed. 870.

The Oklahoma Enabling Act of June 16, 1906, contained the following provision:

> "Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreements, law or otherwise, which it would have been competent to make if this act had not been passed."

The provisions of the Enabling Act were accepted, and the Constitution of Oklahoma, in Article X, Section 6, provides as follows:

> "All property owned by the Murrow Indian Orphan Home, located in Coal County, and all property owned

by the Whittaker Orphan Home, located in Mayes County, so long as the same shall be used exclusively as free homes or schools for orphan children, and for poor and indigent persons, and all fraternal orphan homes, and other orphan homes, together with all their charitable funds, shall be exempt from taxation, and such property as may be exempt by reason of treaty stipulations existing between the Indians and the United States government, or by Federal laws, during the force and effect of such treaties or Federal laws."

There can therefore be no question of paramount authority. The restrictions upon this land were validly imposed by Federal authority. The Federal law prohibits state taxation of Federal instrumentalities. The Constitution of the State of Oklahoma specifically exempts such property from state taxation.

D. The Acts of Congress relative to the lands of dependent Indian wards are paramount, and conflicting state statutes must give way.

Since the land of Miller Tiger is subject to a valid restriction against alienation pursuant to the Act of Congress passed for the protection of this Indian ward of the Federal government, taxation of this land by the State of Oklahoma would necessarily result in a conflict between the state statutes authorizing such taxation, and the act of Congress adopted for the aforesaid purpose. The state taxing statute provides that the tax shall be a lien on the land, and that, upon a failure to pay the taxes, the land shall be sold and a tax deed executed and delivered to the purchaser at

the tax sale. If the land can be taxed it can be sold for the taxes, and the restriction against alienation which was imposed under authority of the act of Congress, and which has been held valid by this court, would be rendered inoperative, as the land would be sold without the approval of the Secretary of the Interior. In these circumstances there can be no question about the necessity for the state statute giving way to the paramount Federal authority.

In *United States* v. *Rickert,* 188 U. S. 432, at page 438, the court said:

> "So that if they may be taxed, then the obligations which the government has assumed in reference to these Indians may be entirely defeated; for by the Act of 1887 the government has agreed at a named time to convey the land to the allottee in fee, discharged of the trust, 'and free of all charge or incumbrances whatsoever'. To say that these lands may be assessed and taxed by the County of Roberts under the authority of the state, is to say they may be sold for the taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from incumbrances."

While that language was used in connection with lands which the United States held in trust for the Indians, it applies with equal force to the case at bar, because the power to tax the land of Miller Tiger involves the power to retard, impede and burden the operations of the United States in carrying out the powers vested in it relative to its Indian wards.

In the same opinion the court had under consideration the authority of the state to tax personal property consisting of cattle, horses, and like property, which had been purchased by the government and furnished to the Indians in order to maintain them on their allotted lands. The court held that such property was not taxable, and used the following language:

> "The personal property in question was purchased with the money of the government and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate, and to induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose."

In *Sperry Oil & Gas Company* v. *Chisholm*, 264 U. S. 488, the court said:

> "The authority thus given by the act of Congress to an Indian of the half blood to make an oil and gas lease upon his restricted 'homestead' allotment, with the approval of the Secretary of the Interior, cannot be limited or contravened by the provision of the Oklahoma law attaching to the execution of a lease upon the family homestead the condition that it must also be executed by his wife. This added requirement is inconsistent with the authority given the allottee by the act of Congress to make such lease when approved by the Secretary of the Interior, and, if the wife does not consent to the lease, would entirely defeat the purpose of Congress. As applied to an oil and gas lease made

by such an allottee upon his restricted 'homestead', the provision of the Oklahoma law is hence invalid because of its repugnancy to the paramount act of Congress. 'The power of Congress to impose restrictions on the right of Indian wards of the United States to alien or lease lands allotted to them in the division of the lands of their tribe is beyond question; and of course it is not competent for a state to enact or give effect to a local statute which disregards those restrictions or thwarts their purpose.' *Bunch* v. *Cole*, 263 U. S. 250, 252."

The decisions of the state court are in harmony with the above decisions. In *Cravens* v. *Amos*, 64 Okla. 71, 166 Pac. 140, the court had under consideration the enforcement of the Occupying Claimants Act of the State for securing compensation for improvements made and taxes paid by an occupying claimant upon restricted Indian lands. The court held that the act was in conflict with the restrictions imposed by Congress and could not be enforced. The language of the opinion is as follows:

"Under Section 4937 the claimant can be kept out of possession until the claim for improvements and taxes is paid. If the claimant should never be able to pay the amount, his right to possession and enjoyment of his title would be permanently denied. In considering the effect of very similar statutes the Supreme Court of Kansas, in *Maynes* v. *Veale*, 20 Kan. 374, said:

"'A continued hostile possession would virtually deny title to the plaintiff; and a temporary hostile possession would embarrass the exercise of that title.'

"In that case the benefit of the occupying claimant statute was denied as against an Indian owner of land

held under treaty stipulations which provided that the land should be exempt from levy, taxation, or sale, and should be alienable in fee, or leased, or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie Tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior should direct. We do not believe that any construction can be given the occupying claimants article which would give it any force or effect without in effect nullifying the restrictions imposed by Congress on the land. The acts of Congress on the subject are, of course, paramount, and conflicting state statutes must give way. *Walker* v. *Brown*, 43 Okla. 144, 141 Pac. 681."

Bunch v. *Cole*, 263 U. S. 250.
Tiger v. *Western Investment Co.*, 221 U. S. 286.
Mullen v. *Pickens*, 250 U. S. 590.
Brader v. *James*, 246 U. S. 88, 96.

E. Since the land is now subject to a valid Federal restriction, it is not subject to state taxes, although it was subject to such taxes at the time it was purchased for Miller Tiger.

Appellant contends that, since the land was subject to state taxation at the time it was purchased for Miller Tiger, it was not withdrawn from the taxing power of the State by reason of the Federal restriction against alienation imposed by the Secretary of the Interior at the time of its purchase. This contention finds support in a decision of the Eighth Circuit in *United States* v. *Mummert*, 15 Fed. (2d) 926. That opinion was based largely upon previous decisions by the same court in *United States* v. *Gray*, 284

Fed. 103; *United States* v. *Ransom*, 284 Fed. 108, and *United States* v. *Brown*, 8 Fed (2d) 564.

In United States v. Brown the court said:

> "Congress has no power to withdraw from taxation in this way lands that have once been subject to taxation. *United States* v. *Law*, 250 Fed. 218; *Sunderland* v. *United States*, 287 Fed. 468."

The court in that case, however, was not considering or determining the question of authority to tax a Federal instrumentality, and did not have before it the question of the taxability of the land, but was considering the validity of the restriction against alienation contained in the deed to Miller Tiger. The court in that case cited United States v. Law and Sunderland v. United States to support the statement.

In United States v. Law the court declined to express an opinion on the subject. The language of the court is as follows:

> "It is contended by appellee that no power exists, even in Congress, to withdraw lands once subject to taxation by state authority from such status of taxability, and that the restrictions upon alienation imposed by the Secretary of the Interior upon the new land purchased for Amanda Perry undertake to effect such withdrawal of the new land. The question whether exemption from taxation was attempted to be created by the restriction provision contained in the deed of the new land to Amanda Perry, and the further question whether Congress could authorize the

creation of such exemption as to this new land, or the transfer of the exemption from the old land to the new, are neither of them involved in the present case, and we express no opinion thereon."

In Sunderland v. United States the right to tax the land in controversy in that case was not before the court, and the only reference made thereto was a statement by the court of the previous decisions of United States v. Gray and United States v. Ransom. The Sunderland case was finally decided by this court in 266 U. S. 226, and the only reference made to the question of taxation was as follows:

"The State of Oklahoma is not concerned, since there is no statute, rule of law or policy which has been called to our attention to the contrary effect. If there were, or if the power of the state to tax were involved, we should consider the question of supremacy of power, but no such question is presented by this record."

It is apparent, therefore, that the question under consideration was not decided in either of those cases.

In *United States* v. *Gray*, 284 Fed. 103, it was contended that certain property purchased by Lizzie Lewis was restricted by reason of provisions inserted in the deed at the time of its purchase, and that by reason of such restriction against alienation the land was exempt from taxation. The court in that case held that the Secretary of the Interior was without authority to impose the restrictions which were contained in the deed, and that therefore, since there were no valid restrictions on the land, such land was not a

governmental instrumentality and was not exempt from taxation. The court in that opinion used the following language:

> "While there is no express provision in the Constitution prohibiting the state from taxing the means and instrumentalities of the general government, yet it is established beyond question that exemptions from such taxation rest upon necessary implication. *McCulloch* v. *Maryland*, 4 Wheat. 316, and cases which follow it establishing that principle need not be further noticed. It would follow that if these two lots were purchased as necessary or appropriate means to be used in caring for, educating or furnishing a needed home for Lizzie Lewis as one of the government's wards, they would be beyond the reach of the state's power to exact, by way of taxation, a tribute or toll laid upon them for local or state purposes."

If the land in that case was not subject to valid restrictions, it was not a Federal instrumentality, and it necessarily followed that it was not exempt from state taxes. The court distinguished that case from *United States* v. *Thurston*, 143 Fed. 287, but did not overrule the following language in that opinion:

> "The lands and their proceeds, so long as they are held or controlled by the United States and the term of the trust has not expired, are alike instrumentalities employed by it in the lawful exercise of its powers of government to protect, support and instruct the Indians for whose benefit the complainant holds them, and they are not subject to taxation by any state or county."

In *United States* v. *Ransom*, 284 Fed. 108, the court

said that the opinion in the case of *Jones* v. *Whitlow* (Okla.), 175 Pac. 753, accorded with the view of that court. An examination of Jones v. Whitlow discloses that the decision in that case was based entirely on the conclusion that the Secretary of the Interior was without power to declare the property purchased for the Indian to be inalienable, and hence the property was not exempt from state taxation. The following language is found in that opinion:

> "It will be noticed the lands on which restrictions are imposed are the lands allotted heretofore or hereafter to the allottee. No mention is made of lands purchased by or for the allottee. There is nothing in this language or in any portion of the act indicating any intention of Congress to empower the Secretary of the Interior to impose restrictions or to hold in trust lands purchased for allottees with royalties accruing from their allotments."

An examination of *McCurdy* v. *United States*, 246 U. S. 263, discloses that this court held that the restrictions which the Secretary of the Interior attempted to impose on the land were not valid and binding, and hence the property was not exempt from state taxation. The court said:

> "It is consistent with the facts shown that the restriction upon alienation inserted in the deed was not a continuation of control reserved by the Secretary of the Interior, but a bringing under his control of a part of Panther's estate theretofore freed. * * * While an Indian is still a ward of the nation, there is power in Congress even to reimpose restrictions on property already freed. *Brader* v. *James*, decided this day, *ante* 88; but Congress did not confer upon the Secretary of

the Interior authority to exercise such power under the circumstances of this case or to give to property purchased with released funds immunity from state taxation."

It is apparent, therefore, that the above cases, with the exception of *United States* v. *Mummert, supra*, and *United States* v. *Brown, supra*, each deal with cases involving unrestricted Indian lands, and do not support the contention that Indian lands, which are impressed with valid Federal restrictions, cannot be exempted from state taxation where such lands are subject to taxation at the time the land was impressed with the restriction and converted into a Federal instrumentality. The Brown and Mummert cases were based on the above cases, and entirely overlooked the distinctions above pointed out. In the Mummert case the court said:

"But it is readily seen, as implied in the opinion in the Sunderland case, that although the interposition of the strong shield of the government is justified, to the end that the Indians be not overreached or despoiled in respect of their property, this does not necessarily imply that ordinary taxation for the benefit of the government, whose protection they enjoy, is calculated to despoil the Indian in respect of his property.

"The spoliation which the law aims to prevent is fraud and overreaching in the matter of alienation. There is contained in the Sunderland case, which goes far in recognizing the retention of governmental control over, and prohibitions against alienation of, lands purchased with restricted funds, the implication that it was not intended thereby to depart from the general

rule with respect to state taxation of lands that theretofore had been subject thereto, unless such intention is made clearly to appear."

We respectfully submit that the authority of Congress and of the Secretary of the Interior, acting under congressional authority to impose restrictions against alienation on property of dependent Indian wards, has been sustained on the ground that such restrictions are necessary and proper in order to prevent the Indians from being overreached or despoiled in respect of their property, but such restrictions having been imposed, no alienation or encumbrance of the property, except in the manner authorized by the Federal law, will be upheld regardless of whether such alienation or encumbrance is fraudulent, or is calculated to despoil the Indian of his property. In the case of *United States* v. *Brown, supra*, there was no question of fraud or overreaching the Indian, Miller Tiger, in the alienation of his land, but the deed was nevertheless cancelled because it was executed in violation of the Federal restriction. The Federal government considered it necessary for the protection and preservation of the estate of its Indian wards to impose the restriction against alienation. The restrictive provision in the deed was the means employed by the Federal government for that purpose. The restrictions having been lawfully imposed, and the land having become a Federal instrumentality, it was immediately taken out of the taxing power of the state. The above decisions

by the eighth circuit are the only ones which have come to our attention which hold that property which has once been subject to the taxing power of the state does not become exempt from taxation when such property becomes a Federal instrumentality.

In *Van Brocklin* v. *Tennessee*, 117 U. S. 151, certain lands in the State of Tennessee were purchased by the United States at a tax sale. The State of Tennessee sought to subject this land to state taxation during the time the same was owned by the United States. Prior to the time the land was purchased by the United States it had been subject to state taxation. This court held that the property, while owned by the United States, was not subject to the state taxes. It is true that in that case the property was owned by the United States, whereas the property in the instant case was owned by Miller Tiger, subject to restrictions imposed by the United States in carrying out its governmental policy. In the Van Brocklin case, however, the taxes were held invalid, not because the land was owned by the United States, but because it was an instrumentality of the Federal government. It may be contended that the statutes of the various states exempted property of the United States from taxation, and that such statutes distinguish a case like the Van Brocklin case from the one at bar. The exemption in the Van Brocklin case, however, was not based on a statutory exemption, but on immunity

granted by the Constitution of the United States. At page 155 the court said:

> "While the power of taxation is one of vital importance, retained by the states, not abridged by the grant of a similar power to the government of the union, but to be concurrently exercised by the two governments, yet even this power of a state is subordinate to, and may be controlled by, the Constitution of the United States. That Constitution and the laws made in pursuance thereof are supreme; they control the constitutions and laws of the respective states, and cannot be controlled by them. The people of a state give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the union are not given by the people of a particular state, but by the people of all the states; and, being given by all, for the benefit of all, should be subjected to that government only which belongs to all. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the taxing power of a state on the means employed by the government of the union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which

exerts the control. The states have no power, by taxation, or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the Federal government."

Again, at page 171, the court said:

"The legislatures of most of the states have affirmed the same principle, by inserting in thier general tax acts an exemption of property belonging to the United States. Such a provision, as has been well observed by the Supreme Court of Connecticut in West Hartford v. Water Commissioners, above cited, is not the foundation of the exemption, but is asserted only from abundant caution, and because the assessment of taxes is to be made by local officers skilled in the valuation of property, but presumably unlearned in legal distinctions."

In *McCulloch* v. *Maryland*, 4 Wheat. 316, at page 429, the court said:

"All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

"The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Conse-

quently the people of a single state cannot confer a sovereignty which will extend over them.

"If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give."

In *United States* v. *Pearson*, 231 Fed. 270, the United States purchased personal property for its Indian wards. This property was exchanged by the Indians for other property, which the state attempted to tax. This personal property had, prior to the time it was acquired by the

Indians, been subject to the taxing power of the state, but as soon as it became restricted Indian property it was not longer subject to taxation.

In *United States* v. *Rickert,* 188 U. S. 433, the State of South Dakota sought to tax improvements made on restricted Indian lands, and also personal property consisting of cattle, horses, etc., which had been issued to the Indians by the United States, and were being used by the Indians upon their restricted allotments. All of that property had theretofore been subject to the taxing power of the state, but this court held that as soon as this property became an instrumentality of the Federal government in carrying out its policy towards its Indian wards, it was no longer subject to taxation.

In *Clallam County* v. *United States,* 263 U. S. 341, an attempt was made to tax property belonging to the United States Spruce Production Corporation, consisting of lands, sawmills, logging railroads, and other property which had been acquired by the corporation in carrying out its work of manufacturing airplanes for the government during the war. All of this property had been subject to the taxing power of the state before it was acquired by the corporation. This court held that such property, while being used as a Federal instrumentality, was not subject to the state tax.

In *King County* v. *United States Shipping Board Emergency Fleet Corporation* (9th Cir.), 282 Fed. 950, the same question was considered by the court in connection with the taxation of property owned by said corporation, and it was held that such property was not subject to taxation.

In *United States Spruce Production Corporation* v. *Lincoln County,* 285 Fed. 388, the syllabus is as follows:

> "Property acquired by the United States, title to which is in the U. S. S. P. Co., a Washington corporation created by the Director of Aircraft Production as a governmental agency, and consisting of timber mills, railroads, port terminals, etc., used and employed solely for governmental purposes, held not subject to taxation."

All of the property which the state sought to tax in that case had been subject to state taxation.

In each instance where property is acquired by the United States or by the United States for a restricted Indian, property or money is paid for the same, and that property, which had theretofore been exempt from taxation, becomes subject to the taxing power of the state immediately when delivered to other persons in exchange for the property acquired by the government, and the property so acquired by the government for itself or for its Indian wards immediately is removed from the taxing power of the state. The money of Miller Tiger which was in the hands of the Superintendent of the Five Civilized Tribes, and

which was used to purchase the land for him, was free from state taxation. As soon as this fund was delivered to Miller Tiger's grantor, it became subject to the state tax, and likewise the land purchased for Miller Tiger was exempted from taxation.

In *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, at page 447, the court said:

> "Taxation is a sacred right, essential to the existence of government; an incident of sovereignty. The right of legislation is coextensive with the incident, to attach it upon all persons and property within the jurisdiction of a state. But in our system there are limitations upon that right. There is a concurrent right of legislation in the states and the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject by express prohibitions in the Constitution; and the states by such as are necessarily implied when the exercise of the right by a state conflicts with the perfect execution of another sovereign power, delegated to the United States. That occurs when taxation by a state acts upon the instruments, emoluments, and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers. The government of the United States is supreme within its sphere of action. The means necessary and proper to carry into effect the powers in the Constitution are in Congress."

In *Buffington* v. *Day*, 11 Wall. 113, at page 118, the court said:

> "It has been decided that a state cannot tax the means used by the general government to execute its

granted powers; because, in the first place, the Constitution expressly provided that in the exercise of these powers the general government should be supreme; because, in the next place, exemption from state taxation was implied in the very grant itself; and also, because it would be practically impossible to carry out the powers granted to the general government if their execution was to be hindered by the taxation which any state might see fit to impose on the means used to carry them out. So far as this question was concerned, it was as if the several states had granted these powers to a foreign government; had guaranteed that in the exercise of these powers the laws of that government should be supreme; and had then undertaken to tax the banks, stock, and the other means used to carry out these powers. And had the foreign government, in its turn, granted similar powers to the several states, and had then undertaken to tax the agents and means used by the state to carry out these powers, the same reasoning would exempt the officers and agencies of the state."

We conclude, therefore, that the exemption of Federal instrumentalities from taxation does not rest upon any action of the Secretary of the Interior in exempting the property from the tax. Neither does it rest on any specific exemption by Congress. The basis for the exemption is in the Constitution of the United States. The Secretary of the Interior, acting under authority vested in him by Act of Congress, had the authority to purchase this land for Miller Tiger with the trust funds of that Indian, and to impose the restrictions which were inserted in the deed. The land thereby became a Federal instrumentality and as such

was and is exempt from all state taxation. While the Secretary of the Interior did not specifically exempt the property from taxation, his action in imposing Federal restrictions and thereby creating a Federal instrumentality for the protection of the Indian ward brought the property within the exemption of the Constitution of the United States.

Question Two.

Is this tax a forbidden tax upon a Federal instrumentality?

We understand that this question relates to the gross production tax which was assessed and collected from the appellees, and does not relate to the tax on the land which we have discussed in the preceding part of this brief.

On February 10, 1919, Miller Tiger executed a departmental oil and gas lease, on the land which had been purchased for him, to G. L. Sandlin, which lease was thereafter assigned to E. L. Robinson and Gibson-Zahniser Oil Corporation. Operating under said lease, appellees have produced oil upon which the State Auditor of Oklahoma has levied and assessed gross production taxes, which taxes were paid under protest. Said taxes were levied and collected under authority of Section 9814, Compiled Oklahoma Statutes of 1921, known as the Gross Production Tax Statute of 1916.

A. This tax was a tax on a Federal instrumentality.

This court has many times held that the gross production tax cannot be collected from lessees operating producing oil wells under departmental leases on restricted Indian lands. In each instance where the state sought to collect the tax from lessees who were producing minerals under departmental leases executed on restricted Indian lands, the tax had been held invalid as an attempt to tax a Federal instrumentality. The original gross production tax statute of the State of Oklahoma was enacted in 1908. Under the provisions of that act the State sought to collect a gross production tax from lessees who were producing minerals under departmental leases executed on restricted Indian lands. The case came before this court in *Choctaw & G. R. R.* v. *Harrison,* 235 U. S. 292, and the tax was held to be invalid. The court used the following language:

> "It is unnecessary to consider the power of the State of Oklahoma to treat coal dug from mines operated by the appellant as other personalty and to subject them to a uniform ad valorem tax, for it seems to us clear that the Act of 1908 provided for no such imposition. Its very language imposes a 'gross revenue tax which shall be in addition to the taxes levied and collected upon an ad valorem basis.' We cannot, therefore, conclude that the gross receipts were intended merely to represent the measure of the value of property liable to a general assessment; provision is made for determining that upon a different basis. *Oklahoma* v. *Wells, Fargo & Co.,* 223 U. S. 298, 301. The requirement is not on account of property owned on a given day, as is

the general custom where ad valorem taxes are provided for and as the Oklahoma laws require; but the manifest purpose is to reach all sales and secure a certain percentage thereof—a method commonly pursued in the respect of license and occupation taxes. *Pullman Co.* v. ***Knott, ante,*** p. 23.

"A tax upon a merchant's, manufacturer's, or miner's gross sales is not the same thing as one on his stock treated as property. Cooley on Taxation (3rd ed.), p. 1095. The former is upon his business. In effect, the Oklahoma Act prescribes an occupation tax (Ohio Tax Cases, 232 U. S. 576, 592); and, accepting as true the allegations of appellant's bill, we think it cannot lawfully be subjected thereto."

In *Indian Oil Company* v. *Oklahoma,* 240 U. S. 522, the court held that a tax on a corporation's interest in oil leases on restricted Indian lands, or a tax on the capital stock of a corporation representing such restricted leases, was a tax on a Federal instrumental and invalid.

After the rendition of those opinions, the State of Oklahoma enacted the Gross Production Tax Law of 1916, which provided:

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the State, counties, cities, towns, townships, school districts and other municipalities, upon any property right attached to or inherent to the right of said minerals, upon the leases for the mining of asphalt and ores bearing lead, zinc, jack, coal, silver or copper, or for petroleum or other crude oil or other mineral oil or for natural gas, upon the mining rights and privileges for the minerals aforesaid, belonging or appertaining to land, or upon ma-

chinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt or any of the mineral ores aforesaid, and actually used in the operation of such well or mine, and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described."

Immediately after the enactment of this law, the State again attempted to collect the gross production tax from lessees who were operating departmental leases on restricted Indian lands. The lessees contended that this tax was also a tax on a Federal instrumentality, and a number of the lessees went into the District Court of the United States for the Western District of Oklahoma and procured an injunction against the State from collecting the tax. An appeal was taken to this court and the judgment of the lower court was affirmed in *Howard* v. *Oil Companies*, 247 U. S. 503.

Prior to the last decision the question was before the Supreme Court of Oklahoma in *Large Oil Company* v. *Howard*, 163 Pac. 537. In that case the Oklahoma court conceded that the lessees were agencies and instrumentalities of the Federal government, and that such agencies and instrumentalities could not be subjected to the taxing power of the State. The court then proceeded to

hold that the 1916 gross production tax was not an occupation tax and was not a tax on the operation of the lease on restricted lands, but was a property tax. The court also held that the case of *Choctaw & G. R. R. Co.* v. *Harrison, supra,* was inapplicable, because that case passed on the gross production act of 1908, which provided that the tax was in addition to the tax levied and collected on an ad valorem basis, whreas the 1916 act provided that the gross production tax was in full and in lieu of all taxes. The court sought to distinguish the case of *Indian Oil Company* v. *Oklahoma, supra,* by saying:

> "The opinion, therefore, is not controlling as the tax herein imposed, not upon the leases or the rights or privileges conferred thereby, but on the production of oil and gas as property."

Further in the opinion the court said:

> "The Act imposes a special tax in lieu of and as a substitute for the general ad valorem tax on oil and gas and the property of the producer used in the production thereof, and is levied by the legislature in the exercise of its constitutional power to select property for the basis of taxation, and to value and classify such property by means and methods differing from that commonly employed in the assessment, levying, and collection of taxes by counties and other municipal authorities."

The decision of the Oklahoma court was reversed by this court in *Large Oil Company* v. *Howard,* 248 U. S. 549.

Notwithstanding the above decisions by this court, the

Oklahoma court on April 5, 1921, in the case of *In re Skelton Lead & Zinc Company's Gross Production Tax of 1919*, 81 Okla. 134, 197 Pac. 495, again sustained the gross production tax imposed on lessees who were producing minerals under departmental leases on restricted Indian lands, and declined to follow decisions of this court. It declined to follow the decision in *Choctaw & G. R. R. Co.* v. *Harrison*, *supra*, because of the Statute of 1908 was under consideration, and it declined to follow *Large Oil Company* v. *Howard*, *supra*, and *Howard* v. *Oil Companies*, *supra*, in which the 1916 Statute was under consideration, and assigned the following reason for declining to follow those decisions:

> "Upon the face of those opinions this court cannot say what was decided. It can say that the statute of 1916 was not referred to, and that the question of a state's power to tax a lessees' private personal share of mine products is not mentioned. Those decisions, whatever may have been the questions involved, are, as a matter of course, final as to those particular cases; but we do not feel that they constitute precedents which bind this court in its decision of questions not mentioned in those opinions nor decided adversely in the cases which they follow."

That statement was made by the court in spite of the fact that the opinion of the Supreme Court of Oklahoma in *Large Oil Company* v. *Howard*, *supra*, shows that the 1916 Statute was involved, and that the Oklahoma court in that case refused to follow the decision of the Supreme Court of the United States in *Choctaw & G. R. R.* v. *Harrison*,

supra, for the very same reasons which were assigned by the court in this last case.

That decision was followed by the Oklahoma court in *In re Protest of Bendelari,* 82 Okla. 97, 198 Pac. 606, and *Bergin Oil & Gas Co.* v. *Howard,* 199 Pac. 209. On the same date the Skelton Lead & Zinc case was decided the court handed down an opinion in *State* v. *Gillespie,* 81 Okla. 163, 197 Pac. 508. That case involved the validity of a state income tax levied upon income derived from a lessee's private share of oil and gas produced under departmental leases upon restricted Indian lands. The State court held that the income was subject to the tax. The case was appealed to this court and an attempt was made to induce this court to overrule the previous decisions in Howard v. Oil Companies and Large Oil Company v. Howard, on the ground that those decisions were rendered without considering the difference between the 1908 Act and the 1916 Act. In answering that contention this court said:

> "It is said also that tangible property within the State is subject to taxation and that therefore the defendant's share of oil and gas cannot escape. If the cases that we have mentioned as decided *per curiam* tend to oppose the State's position, on the ground that if the property is exempt the income from it also is exempt, it is urged that so far as appears the distinction between the statute of 1916 then before the court and the statutes dealt with by the authorities cited in those cases was overlooked.
>
> "We cannot assume that there was the oversight

supposed. The decision in 240 U. S. 522, that such leases were not taxable went on general principles not on the nature of the particular statute, and in *Shaffer* v. *Carter*, 252 U. S. 37, 48, a case that adverted to the distinction relied upon, pp. 57, 58, the decisions *per curiam* were referred to as decided upon the merits. Those decisions appear to us to have been correct. The criterion of interference by the States with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the States are to exist and make laws. *New York, New Haven & Hartford R. R. Co.* v. *New York*, 165 U. S. 628; *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 616. The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance. *Williams* v. *Talladega*, 226 U. S. 404, 416, 417, 419; *Johnson* v. *Maryland*, 254 U. S. 51, 55. 'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.' 240 U. S. 530. The step from this to the invalidity of the tax upon income from the leases is not long.

"In cases where the principle is absolutely immune from interference an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source the tax is *pro tanto* void. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601; a rule lately illustrated by *Evans* v. *Gore*, 253 U. S. 245; and applies in a case somewhat like the present by the Supreme Court of Hawaii, *Oahu Ry. & Land Co.* v. *Pratt*, 14 Hawaii 126. Whether this property could be taxed in any other form or not, it cannot be reached as profits or income from leases such as those before us. The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases, and, stopping short of theoretical possibilities, a tax upon such profits is a direct

> hamper upon the effort of the United States to make the best terms that it can for its wards. *Weston* v. *Charleston,* 2 Pet. 449, 468. The taxation of cattle grazing upon Indian lands held valid in *Thomas* v. *Gay,* 169 U. S. 264, 273, obviously is more remote."

The decision of this court was thereafter followed by the Supreme Court of Oklahoma in *Carter* v. *Phillips,* 88 Okla. 202, 212 Pac. 747.

The authority of the State to tax a Federal instrumentality was again before the Oklahoma court in *Weir* v. *Jaybird Mining Co.,* 104 Okla. 271, 232 Pac. 425. In that case an attempt was made to levy and collect an ad valorem tax on lead and zinc ore extracted from restricted Indian lands under departmental leases, which was stored on January 1st of the taxable year. That tax was levied under that part of Section 9814, Compiled Oklahoma Statutes 1921, which provides:

> "But any interest in the land other than herein enumerated, and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand on the date as of which property is assessed for general and ad valorem taxation, for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

The court cited *In re Skelton Lead & Zinc Company, supra; Protest of Bendelari, supra; Thomas* v. *Gay,* 169 U. S. 264, and *Union Pacific Ry. Co.* v. *Peniston,* 18 Wall. 5, as supporting its conclusion that this tax was not a tax

on a Federal instrumentality, and in the concluding paragraph said:

> "We conclude that the taxes here involved were not upon the lease or upon the occupation of the lessee company or upon its income derived from the lease, but simply an ad valorem tax such as is imposed annually upon the property of all other citizens of the state pursuant to its laws."

That case was appealed to this court and decided in *Jaybird Mining Company* v. *Weir*, 271 U. S. 609. After reviewing the various decisions which we have already cited, the court said:

> "In this case a lease was made to secure the development of the lands and obtain for the benefit of the restricted owner a percentage of the proceeds from the ores to be mined. The ad valorem tax, here in controversy, was assessed on the ores in mass at the mine before sale, and that was an attempt to tax an agency of the Federal government within the principle of the cases cited."

In each of the cases which we have cited the lease was held to be a Federal instrumentality because the land was restricted by Act of Congress pursuant to its established policy of protecting dependent Indian wards in respect to their property. In the case at bar the restriction had been imposed by Act of Congress, and for the very purpose of protecting Miller Tiger, a dependent Indian ward, in respect to his property. The validity of the restriction so imposed has been upheld by this court. The appellees pro-

duced the oil upon which gross production tax was levied and assessed under a departmental lease executed pursuant to the Federal restriction. It is apparent, therefore, that this tax is a tax on a Federal instrumentality.

B. This tax cannot be collected even though it should be determined that the land is taxable.

In *Choctaw & G. R. R. Company* v. *Harrison, supra,* this court held that the 1908 gross production tax of Oklahoma was in effect an occupation tax, and, although the Supreme Court of Oklahoma has held that the tax imposed under the 1916 law is a property tax and not an occupation tax, we submit that it is still in effect an occupation tax.

It is contended by plaintiff in error that the construction of the State court as to the character of this tax is conclusive upon this court. While this court will accept the decision of the State court of last resort as to the proper construction of the statute, it will determine the question as to whether this gross production tax is a tax on a Federal instrumentality upon its own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the State courts.

Crew Levick Company v. *Pennsylvania,* 245 U. S. 292.
United States Express Co. v. *Minnesota,* 223 U. S. 335.
Stockard v. *Morgan,* 187 U. S. 27.

Asbell v. *Kansas*, 209 U. S. 251.
Standard Oil Co. v. *Graves*, 249 U. S. 389.
Choctaw & G. R.-R. Co. v. *Harrison*, 235 U. S. 293.
Galveston, Harrisburg, etc., Ry. Co. v. *Texas*, 210 U. S. 217.
P. S. Oil Corp. v. *Hopkins*, 282 Fed. 253.
Fairfield v. *County of Gallatin*, 100 U. S. 47.
Walker v. *State Harbor Commissioners*, 84 U. S. 648.
Ohio Life Ins. Co. v. *DeBolt*, 57 U. S. 416.
Jefferson Bank v. *Skelley*, 66 U. S. 436.
Shelby County v. *Bank*, 161 U. S. 149.

It is immaterial, however, whether the tax be considered an occupation tax or property tax because, since it is a tax on a Federal instrumentality, it is invalid, without regard to whether it is a property tax or occupation tax. In *Choctaw & G. R. R. Company* v. *Harrison, supra,* the tax was held to be an occupation tax and was held invalid. In *Indian Oil Co.* v. *Oklahoma, supra,* a tax on the capital stock of the corporation which was invested in departmental leases, although a property tax, was held invalid. In *Gillespie* v. *Oklahoma, supra,* an attempt to collect the State income tax on a Federal instrumentality was held invalid. In *Childers* v. *Beaver, supra,* an attempt to collect State inheritance tax on a Federal instrumentality was held invalid. In *Jaybird Mining Company* v. *Weir, supra,* an ad valorem tax on mineral ore produced under a departmental lease was held invalid. Those cases conclusively

determine that the nature of the particular tax is not controlling.

The contention that the land of Miller Tiger cannot be exempted from State taxation, because such land was subject to the taxing power of the State at the time it was purchased for Miller Tiger, has no application to the collection of the gross production tax. It matters not whether the gross production tax is an occupation tax or a property tax. It is certain that it is not a tax on the land and is not in lieu of a tax on the land. The Act itself specifically provides that the gross production tax is not in lieu of a tax on the land. The Act provides that the tax is in lieu of certain ad valorem taxes, which taxes may be classified as follows:

1. Any property rights attached to or inherent in the rights to said minerals.

2. Upon leases for the mining of minerals.

3. Upon machinery, appliances, and equipment used in and around any well producing petroleum or other crude or mineral oil.

4. Upon oil, gas, asphalt, or ores bearing minerals during the tax year in which the same are producing.

5. Investment in any leases, rights, privileges, or property hereinbefore in this paragraph mentioned.

It will be noted that the act does not attempt to levy a tax on the property in possession of the tax payer on a given date, as is the general custom where ad valorem taxes are provided for, and as the Oklahoma laws require. That peculiarity also existed in the 1908 law, and was pointed out by this court in its opinion in *Choctaw & G. R. R. Company* v. *Harrison, supra.*

In *Indian Oil Company* v. *Oklahoma,* 43 Okla. 307, 142 Pac. 997, the court held that oil and gas leases are not subject to the state ad valorem tax. The State court in *Wright* v. *Carter Oil Co.,* 97 Okla. 46, also held that a lessee has no property right in oil and gas in place under land covered by his lease, and the property in such oil does not become absolute until the oil is reduced to actual possession by being brought to the surface and in control. It is apparent, therefore, that the appellees' lease was not subject to an ad valorem tax, and the oil in place was not subject to an ad valorem tax. The act specifically provides that the tax is not in lieu of the tax on the land, and not in lieu of the ad valorem tax on oil which had been reduced to possession, and which was on hand at the date as of which property was assessed for general ad valorem taxation. The only property, therefore, which was subject to an ad valorem tax, and which was exempted by reason of the gross production tax, was machinery, appliances, and equipment used in operating the lease, and

as to such property it will be noted that the gross production tax is not in lieu of the tax on such property which was owned and had a taxable situs on the usual tax-paying day.

Bearing in mind the fact that at the time of the purchase of this land for Miller Tiger there was no oil being produced from said land and the oil lease had not been executed, and that during the period when the land was unrestricted the only property which was subject to State taxation was the land, it is apparent that this gross production tax, which the State is now attempting to collect, did not and could not become operative until after oil had been produced under the departmental lease. In other words, prior to the time the land became restricted, this gross production tax was not being levied or collected, and there was nothing upon which it could operate. There was, therefore, nothing to withdraw from the taxing power of the State. If it should be held that the land is not now exempt from taxation, the State of Oklahoma will have authority to collect State taxes on everything which was subject to the taxing power of the State at the time of the purchase. After the purchase, and while the land was subject to valid Federal restrictions, a departmental oil and gas lease was executed, and oil has been produced thereunder. If the gross production tax is a tax on property, the property which is sought to be taxed was pro-

duced and came into existence by reason of appellees' operations under their departmental lease. Such property was never subject to the taxing power of the State prior to the purchase of the land for Miller Tiger. We submit that, even though it should be determined that the restricted lands of Miller Tiger are not exempt from taxation, the gross production tax levied and collected from appellees is a tax on a Federal instrumentality and is invalid.

Respectfully submitted,

CHARLES B. COCHRAN,
Attorney for Defendants in Error.

AMES, COCHRAN & AMES,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 234.—October Term, 1927.

A. J. S. Shaw, State Auditor, substituted for C. C. Childers, State Auditor of the State of Oklahoma, Plaintiff in Error,
vs.
Gibson-Zahniser Oil Corporation et al., Defendants in Error.

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[April 9, 1928.]

Mr. Justice Stone delivered the opinion of the Court.

Defendants in error brought this suit in the district court for western Oklahoma against plaintiff in error to recover state taxes paid under protest. Judgment was given for the plaintiff, and the case is now pending on writ of error in the court of appeals for the eighth circuit. That court has certified to this, questions of law concerning which it asks instructions for the proper decision of the cause. Jud. Code § 239.

The certificate discloses that defendants in error are the assignees of a departmental oil and gas lease of land belonging to Miller Tiger, a full blood Creek Indian. The leased land was purchased for Tiger while a minor by his guardians, with the permission of the county court of Okmulgee County, Oklahoma. The purchase price came from the accumulated royalties of a departmental lease of his restricted allotted lands. The purchase was made of a non-Indian citizen of Oklahoma and the deed, in compliance with conditions exacted by the Secretary of the Interior and the county court, provided that the land "should not be alienated or leased during the lifetime of the grantee prior to April 26, 1931, without the consent of and approval by the Secretary of the Interior." Before the purchase in 1915 the land had been subject to state, county and municipal taxation. Since then local *ad valorem* taxes on the land have been paid without

objection by the United States Indian Agency. The tax now in question was levied and collected under Okla. Comp. Stat. (1921) § 9814, which imposes on those engaged in the production of oil and gas a tax equal to 3% of the gross value of the oil and gas produced "less the royalty interest". The questions certified are as follows:

1. Had the Secretary of the Interior, on October 24, 1915, when this land was purchased, power to exempt from such state taxation land purchased under his supervision for a full blood Creek Indian with trust funds of that Indian, where the land so purchased was, at that time, subject to all State taxes?
2. Is this tax a forbidden tax upon a federal instrumentality?

In *Sunderland* v. *United States*, 266 U. S. 226, a restriction against alienation like that in the present case imposed by the Secretary on lands purchased for a Creek Indian, as were Tiger's, under § 1, c. 199 of the Act of May 27, 1908, 35 Stat. 312, was held to be a valid exercise of the power of the Secretary to remove restrictions from the land of full blood Indians "wholly or in part, under such rules and regulations concerning terms of sale and disposal of proceeds for the benefit of the respective Indians as he may prescribe." In an earlier case, *McCurdy* v. *United States*, 246 U. S. 263, this Court had held that a similar restriction upon lands similarly purchased for an Osage Indian could not have the effect contended for there, and here, of exempting the land from state taxation for the reason that under the applicable provisions of a different statute, § 5, c. 83, Act of April 18, 1912, 37 Stat. 86, the Secretary was without authority to impose the restriction. And, in *United States* v. *Ransom*, 263 U. S. 691, affirming 284 Fed. 108, it was held, on the authority of *McCurdy* v. *United States, supra*, that the state had power to tax lands purchased for a Creek Indian citizen with restrictions against alienation imposed by the Secretary under § 1 of the Act of May 27, 1908, which was the statute later passed on in *Sunderland* v. *United States, supra*. The construction to be placed on these decisions is that the lands now in question, and hence the interest of the lessee in them, are not such instrumentalities of the government as will be declared immune from taxation in the absence of an express exemption by Congress and that the mere act of the Secretary in imposing the restriction is not the exercise of any power which may reside in Congress to exempt them from taxation.

What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514. The end sought and the mode of attaining it adopted by Congress in the legislation providing for the welfare of the Indians by setting apart, by allotment or otherwise, tribal lands or the public domain, restricted for their benefit, led to the conclusion that those lands and the uses of them were so intimately connected with the performance of governmental functions as clearly to require independence of all state control so complete that nothing short of an express declaration by Congress would have subjected them to state taxation.

Governmental agencies similarly held to be exempt are national banks, *First National Bank of Hartford* v. *Hartford*, 273 U. S. 548; bonds of the national government, *Weston* v. *City Council of Charleston*, 2 Pet. 449, 467; such were and still are the restricted allotted or tribal lands of the Indians: neither leases of those lands, *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522, nor the exploitation of the land by the lessee, *Howard* v. *Gypsy Oil Co.*, 247 U. S. 503; *Large Oil Co.* v. *Kansas*, 248 U. S. 594; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, nor his income from the lease, *Gillespie* v. *Oklahoma*, 257 U. S. 501, may be taxed by the state.

The early legislation affecting the Indians had as its immediate object the closest control by the government of their lives and property. The first and principal need then was that they should be shielded alike from their own improvidence and the spoliation of others but the ultimate purpose was to give them the more independent and responsible status of citizens and property owners. The present statute which enabled Miller Tiger to become the owner of the lands leased to the plaintiff is typical of the latter course of Indian legislation, which discloses a purpose to accomplish that end not only by the gradual relinquishment of restrictions upon the lands originally allotted to the Indians but by encouraging their acquisition of other property and gradually enlarging their control over it until independence should be achieved. See *McCurdy* v. *United States*, *supra*.

The act under which Tiger's allotted land was leased is entitled "An Act for the removal of restrictions from part of the lands

of allottees of the Five Civilized Tribes, and for other purposes." It frees from all restriction the lands of all allottees, of less than three-quarters Indian blood. Section 1 empowers the Secretary of the Interior to remove the restrictions from the lands of full-blood Indians "wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." Section 2 permits the allottees of lands from which restrictions have not been removed to lease them for a period of five years, "Provided, that leases of restricted lands for oil, gas or other mining purposes, . . . may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise." Under § 4 "all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allotteed of the Five Civilized Tribes." In this, as in other Indian legislation, opportunity is afforded for their emancipation by imposing upon them duties as well as giving them the privileges of citizens and property owners, including the duty to pay taxes.

In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. To hold them immune would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks. See *Goudy* v. *Meath*, 203 U. S. 146, 149; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 371; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, 323; *Railroad* v. *Penniston*, 18 Wall. 5; *Choctaw O. & G. R. R.* v. *Mackey*, 256 U. S. 531,

537; *Central Pac. R. R.* v. *California*, 162 U. S. 91, 126. These lands we take to be of that character.

Little need be said as to the power of the Secretary of the Interior to exempt the land and its uses from taxation. The power, if it exists, is one conferred by Congress, but neither it nor the Secretary has in terms purported to make or authorize such an exemption.

The Act of May 27, 1908, contains no express exemption from taxation of the proceeds of restricted lands, but § 4 expressly subjects lands from which restrictions have been removed to state taxation. This section was adopted in response to representations that the revenue of the state of Oklahoma was insufficient for state purpose, that large areas of lands within the state allotted to Indians were exempt from taxation as agencies of the federal government and that Indian citizens were enjoying the benefit of local government without taxation. Report of the Senate Committee on Indian Affairs, S. Rep. No. 575, 60th Cong., 1st Sess.; Report of the House Committee on Indian Affairs, H. Rep. No. 1454, 60th Cong., 1st Sess.

At the time of this legislation restrictions on some allotted lands had been removed by reason of the expiration of the restricted period. There were also allotments on behalf of allottees dying before allotment which in the hands of their heirs were unrestricted. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286. It cannot be assumed that Congress at a time when it was withdrawing allotted lands from their former exemption in order that Indian citizens might assume the just burdens of state taxation, intended to extend a tax exemption by implication. In any case the Secretary of the Interior has never, by rule or regulation or other action, purported to exempt such lands from state taxation. No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land. See *United States* v. *Ransom, supra; United States* v. *Brown*, 8 F. (2d) 564; *United States* v. *Gray*, 284 Fed. 103; *United States* v. *Mummert*, 15 F. (2d) 926.

Question 1: Answered No.
Question 2: Answered No.

A true copy.

Test:

Clerk, Supreme Court, U. S.